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# I KNOW ECONOMIC ACTIVITY WHEN I SEE ECONOMIC ACTIVITY: AN OPERATIONAL OVERHAUL OF THE MEASURE BY WHICH FEDERAL CRIMINAL CONDUCT IS DEEMED “ECONOMIC”

PAUL TZUR\*

## I. INTRODUCTION

Amid the enumerated powers delegated to Congress in the Constitution is the power to “regulate commerce . . . among the several states.”<sup>1</sup> For over fifty years after President Franklin Roosevelt embarked on his New Deal with America, the Commerce Clause was interpreted by the Supreme Court to practically grant plenary power to Congress to pass regulation.<sup>2</sup> During that time, the Court found no federal regulation unconstitutional on grounds that Congress exceeded its Commerce Clause authority.<sup>3</sup> This helps explain the shockwave that swept through both the legal profession and academy when in 1995, the Supreme Court in *United*

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>2</sup> See *United States v. Darby*, 312 U.S. 100, 115 (1941) (plenary power).

<sup>3</sup> See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 83-84 (1999) (“In the half-century following *Wickard*, every one of the vast number of statutes enacted under the Commerce Clause survived judicial review.”); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 511-12 (2002) (same).

*States v. Lopez* found the Gun Free School Zone Act (GFSZA) of 1990, which criminalized possession of guns within 1000 feet of a school zone, to be an unconstitutional exercise of that authority.<sup>4</sup> Chief Justice Rehnquist, writing for the Court's majority, outlined three categories of regulation to operate as a limiting principle on the scope of Commerce Clause authority: the law must regulate a channel of interstate commerce, the law must regulate an instrumentality of interstate commerce, or the regulated purely intrastate activity must have a substantial effect on interstate commerce.<sup>5</sup> Being neither a channel of interstate commerce, such as a road or a river, nor an instrumentality of interstate commerce, such as a truck or a boat, the GFSZA had to substantially affect interstate commerce to be constitutional.<sup>6</sup> The Court summarily stated that the Act "ha[d] nothing to do with 'commerce,'" thereby placing a limit on Congress in making law under the Commerce Clause.<sup>7</sup>

Questions arose as to whether the Court had imposed new, permanent limitations on Congressional power or whether *Lopez* was a mere aberration, nothing more than a flexing of Supreme Court muscle to strike down a law with no connection to commercial activity whatsoever.<sup>8</sup> Those questions were answered in 2000 when the Court again found a law unconstitutional on the same grounds.<sup>9</sup> In *United States v. Morrison*, the Court reviewed whether the private right of action for victims of violent crimes, created within the Violence Against Women Act (VAWA),

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<sup>4</sup> See *United States v. Lopez*, 514 U.S. 549, 551 (1995); cf. Charles Fried, *Revolutions?*, 109 HARV. L. REV. 13, 15 (1995) (stating that the Court's *Lopez* decision was "startling"); Nelson & Pushaw, *supra* note 3, at 93 (noting the "avalanche of litigation in the lower federal courts" triggered by *Lopez*).

<sup>5</sup> *Lopez*, 514 U.S. at 558-59. The third category will be referred to as the "Substantial Effects Category" throughout this paper.

<sup>6</sup> *Id.* at 559. See generally James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 151-53 (2000) (stating examples of the various types of laws within each category).

<sup>7</sup> *Lopez*, 514 U.S. at 561.

<sup>8</sup> See Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 575 (2004) ("Very few cases have been reversed based on *Lopez* or *Morrison* . . ."); Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 732 (2003) ("Indeed, a number of legal scholars questioned whether *Lopez* was merely an aberration rather than an indication of a major shift in doctrine."); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 5 (arguing that the Rehnquist Court's Federalism revival may ultimately be "much ado about nothing"); Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 693 (1996) ("*Lopez* has deprived Congress of very little power.").

<sup>9</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

overstepped Commerce Clause boundaries.<sup>10</sup> Aside from solidifying the limitations imposed by *Lopez*, *Morrison* further defines what is required of a regulation to satisfy the Substantial Effects Category of *Lopez*. Specifically, the majority opinion stated four factors to aid in the analysis: whether the regulation involves “economic activity,”<sup>11</sup> whether Congress included a jurisdictional element to limit scope,<sup>12</sup> whether the stated legislative intent is rational,<sup>13</sup> and the degree to which the regulation has more than an attenuated effect on interstate commerce.<sup>14</sup> In similar fashion to *Lopez*, the Court declared the VAWA unconstitutional as not involving an economic activity, and hence, not satisfying the *Lopez* Substantial Effects Category.<sup>15</sup>

Justice Thomas concurred in *Lopez*, sparking a dialogue among scholars about the original meaning of the word “commerce” at the time of Constitutional ratification.<sup>16</sup> He reminded the Court of the deviations in the meaning of commerce caused by the New Deal.<sup>17</sup> In a future case, he opined, the Court should “reconsider [the] ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.”<sup>18</sup> This statement was a call to arms to all

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<sup>10</sup> Violence Against Women Act of 1994 § 40302, 42 U.S.C. § 13981 (2003) (“All persons within the United States shall have the right to be free from crimes of violence motivated by gender.”), *quoted in Morrison*, 529 U.S. at 605.

<sup>11</sup> *Morrison*, 529 U.S. at 610. This factor will be referred to as the “Economic Activity Test” throughout this paper.

<sup>12</sup> *Id.* at 611-12.

<sup>13</sup> *Id.* at 612.

<sup>14</sup> *Id.* This factor will be referred to as the “Attenuation Factor” throughout this paper.

<sup>15</sup> *Id.* at 617.

<sup>16</sup> *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). See generally Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) [hereinafter Barnett, *New Evidence*] (furthering the ongoing debate on the meaning of commerce at the time of ratification); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) [hereinafter Barnett, *Original Meaning*]; Peter A. Lauricella, *The Real “Contract with America”: The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377 (1997) (supporting Justice Thomas’s argument for a return to pre-New Deal Commerce Clause jurisprudence).

<sup>17</sup> *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

<sup>18</sup> *Id.* at 585 (Thomas, J., concurring); see *Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (“By continuing to apply this *rootless and malleable standard*, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.”) (emphasis added); see also Sabri v. United States, 124 S. Ct. 1941, 1949 (2004) (Thomas, J., concurring) (“I continue to doubt that we have correctly interpreted the Commerce Clause.”). In contrast, according to the majority opinion, the three-category test of the *Lopez* majority tracked the historical progression of

Originalists to precisely determine the original meaning of "commerce."<sup>19</sup> Although this body of work has been painstaking, the academics involved in this debate consciously rejected the majority's *Lopez* and *Morrison* tests, instead focusing on a return to an original meaning of the Commerce Clause.<sup>20</sup>

Meanwhile, the lower courts confronted with Commerce Clause questions began interpreting the majority's tests. Since *Morrison* was decided, the new Commerce Clause analysis has been haphazardly applied by the lower courts, and the culprits for this inconsistency have been the Economic Activity Test, conjoined with the Attenuation Factor.<sup>21</sup> Furthermore, the Court created these new Commerce Clause tests while reviewing *criminal* regulation.<sup>22</sup> The message sent to Congress was that although outer limits had always existed on Commerce Clause authority,<sup>23</sup> those limits are broad and stretch into a realm rarely associated with commercial or economic activity—criminal law.<sup>24</sup> The majority's tests

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Commerce Clause power. These seemingly new restrictions had both always existed and did not reject any past precedent. The GFZSA merely was the first instance in which the Court had the opportunity to review a law crossing the proverbial line. See *Lopez*, 514 U.S. at 559-60.

<sup>19</sup> See sources cited *supra* note 16.

<sup>20</sup> But see Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason* in United States v. Morrison, 18 CONST. COMMENT. 563 (2001) (arguing that economic activity is no standard at all because of the immenseness of the concept of "economic"); Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675 (2002) (advocating supplanting the *Lopez* and *Morrison* tests with a jurisdictional test incorporating a "purpose nexus" requirement); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 556 (1995) (advocating reading Art. 1, § 8 enumerated powers as a general framework for Federalism rather than as independent, limited realms of Congressional lawmaking authority).

<sup>21</sup> See United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003); United States v. Holston, 343 F.3d 83 (2d Cir. 2003); United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003); United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000); United States v. Bird (*Bird II*), 279 F. Supp. 2d 827 (S.D. Tex. 2003); see also United States v. Rodia, 194 F.3d 465 (3d Cir. 1999) (pre-*Morrison*, but employs the *Morrison* structure).

<sup>22</sup> See United States v. Morrison, 529 U.S. 598, 601 (2000) (VAWA); United States v. Lopez, 514 U.S. 549, 551 (1995) (GFSZA).

<sup>23</sup> See *supra* text accompanying note 18. But cf. McGinnis, *supra* note 3, at 518-19 (arguing that the Court imposed new Commerce Clause limitations through criminal law because "there is simply too much obstructing precedent" to return to a pre-New Deal interpretation of the Clause and because "ousting the federal government from jurisdiction over noneconomic matters is less controversial").

<sup>24</sup> See Garnett, *supra* note 8, at 4 (noting that even after *Morrison*, both the federalization of crime has continued and the lower courts have not aggressively curbed the trend). See generally Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez*, or

provided little guidance to the lower courts for finding the boundary between economic criminal conduct and noneconomic criminal conduct. As such, circuit splits have arisen in a menagerie of criminal law suits addressing constitutionality under the Commerce Clause. For instance, the Fifth Circuit held that a law criminalizing possession of child pornography made with material traveling through interstate commerce is constitutional.<sup>25</sup> In contrast, the Ninth Circuit found the same law unconstitutional when applied to the owner of a photograph in which both herself and her ten-year-old daughter were depicted exposing themselves explicitly.<sup>26</sup>

This paper's purpose is to impersonate a Machiavellian scribe, whispering in the collective ear of the circuit court judges confronting Commerce Clause challenges. The debate over the original intent of "commerce" is set aside, with focus being diverted to the operation of the Economic Activity Test, coupled with the Attenuation Factor.<sup>27</sup> In the interests of uniformity among the lower courts, consistency with *Lopez* and *Morrison*, and a structured and principled rule of law, this paper proposes the following limiting interpretation of the two *Morrison* factors. First, a law that *directly affects* some exchange, transaction, or contract of value to all engaged parties is a regulation of an economic activity.<sup>28</sup> Second, a law that has the *purpose of regulating* some exchange, transaction, or contract of value to all engaged parties is a regulation of an economic activity.<sup>29</sup> In determining whether a law has the purpose of regulating valuable transactions, courts should review whether a jurisdictional element is

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*What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 Wis. L. REV. 369, 369-70 (noting some commentators have called *Lopez* nothing more than "symbolic").

<sup>25</sup> 18 U.S.C. § 2252(a)(4)(B) (2003); *Kallestad*, 236 F.3d at 226 (addressing whether an owner of photographs and films made for personal use depicting teenage girls engaging in sexually explicit activity was criminally liable).

<sup>26</sup> *McCoy*, 323 F.3d at 1115.

<sup>27</sup> See *id.* at 1119 (beginning with a review of "whether simple intrastate possession of child pornography, without more, is a commercial or economic activity," and with a review of "whether the connection between such possession and interstate commerce is attenuated" both because "they are related and require a similar analytic approach, [and] because *they are the most important ones*") (emphasis added); see, e.g., sources cited *supra* note 16.

<sup>28</sup> This category is derived from *Morrison*'s Economic Activity Test.

<sup>29</sup> This category is derived from *Morrison*'s Attenuation Factor, which imposes a limit on the Economic Activity Test. This paper interprets the Attenuation Factor to mean that a law with only indirect effects on valuable transactions must have the *purpose* of directly affecting valuable transactions. All laws that merely indirectly affect valuable transactions and are shown not to have the purpose of regulating valuable transactions are unconstitutional. See *infra* Section III.A.

employed as well as the intent of the legislature in passing the law.<sup>30</sup> A law that satisfies either the direct effect or the purpose category substantially effects interstate commerce, satisfies *Lopez* and *Morrison*, and is resultantly constitutional.

Section II of this paper briefly surveys the history of the definition of commerce and shows how its ever-changing definition has been central to the variation in breadth of the enumerated power. Additionally, the inconsistencies among the circuit courts in application of *Morrison*'s Economic Activity Test are explained in this section. In Section III, the limited Economic Activity interpretation proposed by this paper is itself tested. First, the structure of the analysis is explained, and justifications for a limited interpretation of *Lopez* and *Morrison* are presented. This paper's test is also applied to past Supreme Court precedent as a means of validation in this Section. Although much of the *Lopez* and *Morrison* Commerce Clause analysis is flexible and interpretable, the Supreme Court was adamant that neither case overturned past Commerce Clause precedent. Per this stance, any Commerce Clause interpretation that produces results in conflict with past precedent does not comport with either *Lopez* or *Morrison*. Whether these two cases were correctly decided or not, the overarching goal of the limited Economic Activity interpretation proposed here is to conform the lower courts to *Morrison*, not to conform *Morrison* to an Originalist's, Textualist's, or Pragmatist's interpretation of the Commerce Clause. This interpretation is no more relevant than a Commerce Clause cocktail party anecdote if unable to derive the results previously reached by the Court. Finally, Section IV is devoted to applying this newly minted limited Economic Activity interpretation to the quagmire of lower court criminal law decisions that motivated this paper. This section explains how adoption of the proposed interpretation creates a uniform standard and alleviates the current inconsistencies among the lower courts. The battleground for the New Federalism has formed in the realm of criminal law, which typically has little to do with economic activity.<sup>31</sup> A clear approach to adjudicating Commerce Clause attacks is needed if the Court's New Federalism is to survive in the lower courts.

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<sup>30</sup> The existence of a jurisdictional element, such as the phrase "traveled through interstate commerce," is the second factor employed in *Morrison*. A review of the legislative intent for passing the law is the third *Morrison* factor.

<sup>31</sup> See, e.g., Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 618, 622 ("In 1995, the New Federalism broke out of the limited area of state immunity.").

## II. A SURVEY OF THE INCONSISTENT MEANING OF COMMERCE AND SOME RECENT EFFECTS OF THAT INCONSISTENCY

The breadth of the power to regulate commerce among the several states has wildly fluctuated throughout the nation's history. Until the late nineteenth century, however, the Court barely addressed the scope of the power conferred on Congress by the Commerce Clause. The general law was that regulation of commerce included the regulation of people in the process of, and activities associated with, conducting transactions of commodities.<sup>32</sup> With respect to criminal regulation, the Commerce Clause extended to acts interfering with, obstructing, or preventing the exercise of power to regulate commerce and navigation among the several states.<sup>33</sup> The

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<sup>32</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824). New York passed and amended an act that granted R. R. Livingston and Robert Fulton exclusive license to operate steam boats in New York waterways. This monopoly was to run for thirty years, beginning in 1808. *Id.* at 6-7. Aaron Ogden acquired title to this exclusive license from Livingston and Fulton and operated a ferry service between New Jersey and New York. *Id.* at 7. In 1818, Ogden filed an injunction against Thomas Gibbons, who had begun to operate a competing ferry service without license in violation of Ogden's exclusive right. *Id.* at 1, 6-8. Gibbons argued that "the boats employed by him were duly enrolled and licensed" under a federal act "for enrolling and licensing ships and vessels . . . in the coasting trade . . ." *Id.* at 2. Chief Justice Marshall, writing for the majority, held that Congress had power, conferred through the Commerce Clause, to regulate ferries on navigable waterways. *Id.* at 190. Mimicking Hamilton's remarks in *The Federalist No. 11*, Marshall saw "commerce" as "intercourse between nations, and parts of nations." *Id.* at 189-90; see *THE FEDERALIST NO. 11*, at 57 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>33</sup> *United States v. Coombs*, 37 U.S. 72, 78 (1838). The Supreme Court allowed Congress to criminalize activity that acts as an obstruction to the channels of commerce. See *id.* at 79 ("[D]oes [the statute] mean . . . to prohibit and punish such plunder, stealing, or destroying of . . . property; whether the act be done on shore, or in any of the enumerated places below high water mark. In our opinion, the latter is the true interpretation of this clause of the section."). In *Champion v. Ames*, the Court held constitutional the criminalization of the sale of lottery tickets using interstate channels on the ground that articles of traffic, such as lottery tickets, are articles of commerce. 188 U.S. 321 (1903). The *Champion* Court rejected an argument that Congress may only regulate and not prohibit. *Id.* But see *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (distinguishing between regulating commerce and regulating the movement of commerce). Ten years later in *Hoke & Economides v. United States*, the Court analogized the transport of prostitutes to the transport of lottery tickets and held that Congress had authority to criminalize the transport of prostitutes across state lines. 227 U.S. 308 (1913); see *Caminetti v. United States*, 242 U.S. 470 (1917). The Court stated "that Congress has power over transportation among the several states" and application of this power "may have the quality of police regulations." *Caminetti*, 242 U.S. at 492 (internal quotations omitted); *Hoke*, 227 U.S. at 323 (internal quotations omitted). Ironically, commentators now argue that many of the early twentieth century pre-New Deal cases placed artificial constraints on Congressional Commerce Clause powers. See *United States v. Lopez*, 514 U.S. 549, 556 (1995); Nelson & Pushaw, *supra* note 3, at 78 (calling the pre-New Deal erratic-seeming decisions the result of "conservatism").



power decreased just prior to the turn of the century with the passing of the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890.<sup>34</sup> The Court began distinguishing between activities involving mining, manufacturing, or agriculture and those involving commerce, extending Congressional lawmaking authority to the latter but not the former.<sup>35</sup> During this time, the Court also experimented with drawing Commerce Clause distinctions between those regulations having direct effects on commerce and those having indirect effects.<sup>36</sup> In 1937, after a period during which the Court rejected a series of New Deal regulations designed to stimulate the economy out of the Depression, the Court abandoned these formal tests,<sup>37</sup> replacing them with a deferential approach to Commerce Clause challenges that effectively granted Congress plenary regulatory authority.<sup>38</sup> Although this change was rooted in regulation designed to stimulate the economy, Congress soon branched out into realms traditionally left for state legislation and enforcement, particularly criminal

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<sup>34</sup> Sherman Anti-Trust Act of 1890 §§ 1-7, 15 U.S.C. §§ 1-7 (2003); Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (2003).

<sup>35</sup> See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

<sup>36</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935); *Houston E. & W. Railroad Co. v. United States* (The Shreveport Rates Cases), 234 U.S. 342 (1914).

<sup>37</sup> While President Roosevelt threatened to pack the Court with Justices willing to find his policies constitutional, the existing Court replaced the restrictive interpretation of the Commerce Clause with an almost plenary power interpretation. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 187 (1997). Compare JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 135, 140 (1937) (positing that Justice Roberts's "switch in time" from the conservative faction of the Court to the liberal wing occurred before the President's Court-Packing Plan was announced), with MERLO J. PUSEY, *THE SUPREME COURT CRISIS* (1937) (arguing that the Court-Packing Plan had intimidated Justice Roberts into reversing his voting trend from conservative to liberal). See generally Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 630-31 (1994).

<sup>38</sup> In *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, the Court held that the National Labor Relations Act of 1935, which gives employees rights to organize unions and restricts employer freedoms, was constitutional under the Commerce Clause. 301 U.S. 1, 30 (1937). In so holding, the Court stated that "[i]t is the effect upon commerce, not the source of the injury, which is the criterion" for determining Commerce Clause constitutionality. *Id.* at 32. The Court solidified this "effect upon commerce" review in *United States v. Darby*, in which legislation regulating labor hours and wages was held constitutional. 312 U.S. 100, 115, 119 (1941). In "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *United States v. Lopez*, 514 U.S. 549, 560 (1995), the *Wickard v. Filburn* Court upheld as constitutional the Agricultural Adjustment Act of 1938, which limited the amount of wheat that farmers could produce in a given season. 317 U.S. 111, 115 (1942); see Agricultural Adjustment Act of 1938 § 331, 7 U.S.C. § 1331 (2003). Farmer Roscoe Filburn was found liable under the Act, even though he overproduced wheat for personal consumption and with no intent to sell. See *Wickard*, 317 U.S. at 125, 127-29 (holding that "[h]omegrown wheat . . . competes with wheat in commerce").

law.<sup>39</sup> But in 1995, the Rehnquist Court ended the ever-expanding Congressional Commerce Clause power in *Lopez*,<sup>40</sup> a challenge to the Gun Free School Zones Act (GFSZA) of 1990.<sup>41</sup>

#### A. THE RETURN OF THE RESTRICTIVE COMMERCE CLAUSE JURISPRUDENCE THROUGH CRIMINAL LAW ADJUDICATION

After Chief Justice Rehnquist's tenure on the Supreme Court has expired, his Court may be best remembered for its work in effectively crafting the first limitations imposed on Congressional Commerce Clause power since before World War II,<sup>42</sup> thereby resurrecting federalism principles extinguished when the New Deal Court interpreted the Clause as a grant of virtual plenary power.<sup>43</sup> These limitations were first articulated in *Lopez*. On March 10, 1992, twelfth-grader Alfonzo Lopez arrived at his San Antonio, Texas high school carrying a .38-caliber gun and bullets.<sup>44</sup> Due to an anonymous tip, Lopez was confronted by school officials, and he admitted to possessing the weapon.<sup>45</sup> Charges under Texas state law for possession of the weapon were filed but subsequently dropped in lieu of federal charges per the GFSZA.<sup>46</sup> The statute made an individual's knowing possession of a firearm in a school zone a federal offense.<sup>47</sup>

The Court's decision, authored by Chief Justice Rehnquist, categorized all Congressional powers conveyed by the Commerce Clause. Congress may regulate the channels of commerce, the instrumentalities of commercial channels, and purely intrastate "activities that substantially

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<sup>39</sup> See Nelson & Pushaw, *supra* note 3, at 88 (arguing that the Substantial Effects Factor, which was first stated in *Darby*, allowed for significant Congressional expansion into criminal law legislation); Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 83 (1997) (arguing the same). For examples of such a federal regulation, see *United States v. Perez*, 402 U.S. 146, 147, n.1 (1971) (citing Title II of the Consumer Credit Protection Act of 1964, 18 U.S.C. §§ 891-896 (2003)). See also *Sabri v. United States*, 124 S. Ct. 1941 (2004) (citing 18 U.S.C. § 666(a)(2) (1986)).

<sup>40</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>41</sup> Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (2003).

<sup>42</sup> See, e.g., Choper, *supra* note 8, at 793 (positing that the Rehnquist Court's "defining issue" has been its federalism decisions restricting congressional Commerce Clause authority).

<sup>43</sup> See generally Hon. Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1996) (referring to post-New Deal Commerce Clause as the "Hey, you-can-do-whatever-you-feel-like Clause").

<sup>44</sup> *Lopez*, 514 U.S. at 551.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (2003).

affect interstate commerce.”<sup>48</sup> Not having any connection to either the channels or the instrumentalities of commerce, the GFSZA could only be upheld upon a showing that the prohibited activity substantially affected interstate commerce. The Court noted that all regulation found constitutional by the Court substantially affecting interstate commerce was economic in nature.<sup>49</sup> Thus, a limiting principle could be applied to the third category of Commerce Clause power: Congress may regulate economic activity that has a substantial affect on interstate commerce.<sup>50</sup> Finding no regulation of any economic activity within the text of the GFSZA, and rebuffing the government’s argument that the effects of guns near school zones are sufficiently related to general economic harm to society, the Court rejected the GFSZA as unconstitutional on Commerce Clause grounds.<sup>51</sup> In concurrence, Justices Kennedy and O’Connor looked to federalism principles for support.<sup>52</sup> Rather than apply the formula created by the majority opinion, the two Justices advocated an inquiry into whether the activity at issue was traditionally regulated by the States.<sup>53</sup>

Five years later, again in an opinion authored by Chief Justice Rehnquist, the Court in *Morrison*<sup>54</sup> further defined the boundary of the Commerce Clause. In that case, a female student accused two football players at the Virginia Polytechnic Institute of rape.<sup>55</sup> The female student filed a complaint under the Violence Against Women’s Act (VAWA), which created a private right of action for female victims of violence against their assailants.<sup>56</sup> The Court began by categorizing the VAWA under the Substantial Effects Category of *Lopez*,<sup>57</sup> assigning four factors for review: (1) whether the regulation involves “economic activity,” (2)

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<sup>48</sup> *Lopez*, 514 U.S. at 559.

<sup>49</sup> *Id.* at 560.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 561 (holding that “§ 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”) (emphasis added). In arriving at this decision, the Chief Justice found support in the longstanding reservation of criminal lawmaking authority to the states. *Id.* at 561 n.3.

<sup>52</sup> *Id.* at 580 (Kennedy & O’Connor, J.J., concurring).

<sup>53</sup> *Id.* (Kennedy & O’Connor, J.J., concurring).

<sup>54</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>55</sup> *Id.* at 602-03.

<sup>56</sup> *Id.* at 604-05; see Bradley, *supra* note 8, at 573 (“*Morrison* arose from a civil suit under the [VAWA] . . .”). The VAWA states that “[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.” Violence Against Women Act of 1994 § 40302, 42 U.S.C. § 13981 (2003).

<sup>57</sup> *Morrison*, 529 U.S. at 608-09.

whether a jurisdictional element limits the regulation's application, (3) whether existing legislative intent is rational, and (4) whether the regulation has more than an attenuated effect on interstate commerce.<sup>58</sup> Notwithstanding voluminous evidence presented by Congress that violence against women creates a significant pecuniary cost for society, the Court held that the VAWA involved no economic activity and was consequently unconstitutional.<sup>59</sup>

In both cases, the Court emphasized that this seemingly new limitation on Commerce Clause power was not tantamount to a blanket reversal of the past fifty years' jurisprudence.<sup>60</sup> Instead, the Court imposed a limiting principle on the meaning of commerce, one that had arguably been implied throughout Commerce Clause history. Legislation regulating economic activity that substantially affects interstate commerce will be sustained as constitutional.<sup>61</sup> Furthermore, deference to Congressional findings regarding the effects on commerce of noneconomic activity is alone insufficient to show economic activity.<sup>62</sup> All regulations that directly affect economic activities and even some regulations of noneconomic activities are constitutional.<sup>63</sup>

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<sup>58</sup> *Id.* at 609-13 (summarizing the framework initially reviewed in *Lopez*).

<sup>59</sup> *Id.* at 617.

<sup>60</sup> See *United States v. Lopez*, 514 U.S. 549, 560 (1995) (holding that all past precedent, including *Wickard*, is distinguishable from this case); *Morrison*, 529 U.S. at 608 (discussing the same).

<sup>61</sup> *Lopez*, 514 U.S. at 560.

<sup>62</sup> See McGinnis, *supra* note 3, at 514; Bradley, *supra* note 8, at 610 ("[I]t is neither necessary nor dispositive for the statute to contain . . . a congressional finding of an effect on commerce, though [this is] helpful.").

<sup>63</sup> This past term, the Court again reviewed, albeit briefly, whether a federal criminal law withstood the *Lopez/Morrison* Commerce Clause rubric. In *Sabri v. United States*, the Court reviewed whether Congress possesses the authority to pass 18 U.S.C. § 666(a)(2), which criminalizes bribery in excess of \$5,000 of any governmental agent or organization. 124 S. Ct. 1941, 1944-45 (2004) (citing 18 U.S.C. § 666(a)(2) (1986)). In response to Basim Sabri's contention that § 666(a)(2) violates Congressional Commerce Clause authority, as defined by *Lopez* and *Morrison*, the Court held that those "precedents do not control here." *Id.* at 1947. The Court noted that the statutes held to be unconstitutional in *Lopez* and *Morrison* had "nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Id.* (internal quotations omitted). In contrast, the Court held that Congress has the authority under the Commerce Clause "to protect spending objectives from the menace of local administrators on the take." *Id.* Thus, unlike the GFSZA and the VAWA, the statutes held to be unconstitutional in *Lopez* and *Morrison*, respectively, Congress has the authority under the Commerce Clause to pass § 666(a)(2), which has a substantial effect on commerce and is inextricably linked to spending. See *id.* ("Sabri would be hard pressed to claim . . . that § 666(a)(2) 'has nothing to do with' the congressional spending power.").

B. TREATMENT OF FEDERAL CRIMINAL LAW, AS OBSERVED  
THROUGH REGULATION OF CHILD PORNOGRAPHY, ABORTION  
CLINIC PROTECTIONS, AND MACHINEGUN POSSESSION

While the Commerce Clause original intent debate raged, a significant problem brewed in the lower courts.<sup>64</sup> The Supreme Court imposed limitations on the Commerce Clause by reviewing two criminal suits.<sup>65</sup> Implicitly, this conveyed a message to Congress that the bounds of its Commerce Clause authority are so broad that only regulation of activity so unconnected to commerce as to never be deemed commercial is unconstitutional.<sup>66</sup> But lower courts are now trying to mold the contours of the "economic criminal conduct."<sup>67</sup> The courts have resultantly conflicted regarding whether various federal laws are constitutional, particularly child pornography laws, abortion clinic protections, and machinegun possession laws, all discussed below.

*1. The Child Pornography Backdrop Through the Kallestad and McCoy Courts*

Child pornography laws have been included in chapters of the U.S. Code designed to protect children from abuse.<sup>68</sup> In 1978, the Committee on the Judiciary and the Committee on Human Resources were confronted with the following conclusions from staff investigations:

[C]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale[;] the use of children as . . . the subjects of pornographic materials is very harmful to both the children and the society as a whole[;] . . . the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce[;] and . . . existing federal laws [prior to 1977]

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<sup>64</sup> Cf. Nelson & Pushaw, *supra* note 3, at 93 (noting the "avalanche of litigation in the lower federal courts" since *Lopez*); St. Laurent, *supra* note 39, at 88 ("The reactions of the lower federal courts to *Lopez* have been somewhat mixed . . .").

<sup>65</sup> See *Lopez*, 514 U.S. at 551 (GFSZA); *Morrison*, 529 U.S. at 601 (VAWA).

<sup>66</sup> See sources cited *supra* note 24.

<sup>67</sup> Compare Reynolds & Denning, *supra* note 24, at 392 (arguing that lower court inconsistency in applying *Lopez* is due to ambiguity in the decision), with Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003) ("The more strenuously the courts resist the implementation of *Lopez* and its progeny, the more it begins to look as if the [lower] courts simply disagree with the results.").

<sup>68</sup> See 18 U.S.C. § 2252 (2003). This section is contained in chapter 110, entitled "Sexual Exploitation and Other Abuse of Children."

dealing with prostitution and pornography do not protect against the use of children in these activities and that specific legislation in this area is both advisable and needed.<sup>69</sup>

With this showing, 18 U.S.C. § 2252 was enacted, prohibiting the transport, purchase, sale, or possession of any depiction of a minor engaged in sexually explicit activity.<sup>70</sup>

Among recent constitutional attacks against 18 U.S.C. § 2252 was the Fifth Circuit's review of § 2252(a)(4)(B) in *United States v. Kallestad*.<sup>71</sup> Charles Kallestad was discovered possessing a substantial quantity of nude photographs and movies of women, some of whom appeared to be minors.<sup>72</sup> He met many of these girls after advertising in the local newspaper for "slender female nude models," and had stated in several of these advertisements that age was irrelevant.<sup>73</sup> Of those who responded, some were as young as sixteen or seventeen, a fact about which Kallestad was aware.<sup>74</sup> Kallestad was convicted on six counts of violating § 2252(a)(4)(B).<sup>75</sup>

The Fifth Circuit systematically reviewed the four-part test created in *Morrison*, after summarily determining that § 2252(a)(4)(B) could only be upheld under the Substantial Effects Category of *Lopez*.<sup>76</sup> The court distinguished § 2252(a)(4)(B) from the GFSZA to interpret the law as a regulation of an economic activity.<sup>77</sup> Recognizing that mere possession of this pornographic material is inherently different than the trade of the same material, the court analogized homemade child pornography to Farmer

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<sup>69</sup> See S. REP. NO. 95-438, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 40, 42-43. Although displaying concern regarding encroachment upon state police power, Congress was "convinced that the use of children in the production of pornographic material is a matter that cannot be adequately controlled by state and local authorities" alone. *Id.* at 10. Among the most startling evidence of this problem's magnitude was the research of Robin Lloyd, who had discovered over 260 unique periodicals depicting minors engaged in sexually explicit conduct. *Id.* at 5.

<sup>70</sup> 18 U.S.C. § 2252 (pertaining to "[c]ertain activities relating to material involving the sexual exploitation of minors").

<sup>71</sup> 236 F.3d 225 (5th Cir. 2000). Subsection (B) states that anyone who "knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . . transported in interstate or foreign commerce, or which was produced using materials . . . [so] transported . . . shall be punished . . ." if "such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(4)(B).

<sup>72</sup> *Kallestad*, 236 F.3d at 226.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 228-29.

<sup>77</sup> *Id.* at 228 (distinguishing § 2252(a)(4)(B) from the GFSZA).

Filburn's home-grown wheat at issue in *Wickard v. Filburn*.<sup>78</sup> The court held that production of a good for which a liquid market exists, such as the wheat and child pornography markets, is economic and commercial in character in the aggregate, even when particular quantities are produced for personal consumption.<sup>79</sup> As a result, the Fifth Circuit found § 2252(a)(4)(B) constitutional under the Commerce Clause.<sup>80</sup>

Three years later in *United States v. McCoy*,<sup>81</sup> the Ninth Circuit reviewed § 2252(a)(4)(B). Jonathan and Rhonda McCoy, parents of a ten-year-old girl and twenty-month-old son, were at home with their children preparing for Easter.<sup>82</sup> Rhonda, who was disposed to heavy alcohol use, was photographed next to her daughter while both were exposing their genitals.<sup>83</sup> The film developer discovered the photograph.<sup>84</sup> Jonathan was acquitted of all charges brought under 18 U.S.C. § 2251(b), a statute that prohibits the manufacture by a parent of child pornography with materials that were transported through interstate commerce. Rhonda, however, was charged with possession of the photograph per § 2252(a)(4)(B).<sup>85</sup>

The court systematically reviewed the four elements defined in *Morrison* and concluded that the law was unconstitutionally applied to McCoy.<sup>86</sup> With respect to whether the activity was economic in nature, the

<sup>78</sup> See *id.*; *Wickard v. Filburn*, 317 U.S. 111 (1942); *supra* note 38 (discussing *Wickard*).

<sup>79</sup> *Kallestad*, 236 F.3d at 228. The majority's reasoning was recently followed by the Second Circuit reviewing *United States v. Holston*, another 18 U.S.C. § 2252(a)(4)(B) suit with similar facts. See 343 F.3d 83 (2d Cir. 2003) (addressing the constitutionality of § 2252(a)(4)(B) when Holston was found possessing pornographic material depicting a ten-year-old girl and a thirteen-year-old girl who lived in a neighboring apartment).

<sup>80</sup> *Kallestad*, 236 F.3d at 231.

<sup>81</sup> 323 F.3d 1114 (2003).

<sup>82</sup> *Id.* at 1115.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1116.

<sup>86</sup> *Id.* at 1119-33. Suppose that a person is charged with violating a federal criminal statute. Among his strategic alternatives to avoid conviction is to assert an affirmative defense that the law is inapplicable, despite admission that his actions would make him liable under the law. If reviewed on constitutional grounds, this inapplicability can be asserted in one of two ways. The law may be an impermissible application of the lawmaker's authority to pass law, or the law may be permissible but does not constitutionally apply to the circumstances in the particular suit. The former is dubbed a "facial challenge" and the latter an "as-applied challenge." See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (permitting as-applied constitutional challenges); Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 431-32 (2003) (distinguishing facial challenges from as-applied challenges). Compare Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (finding applications and limitations for both facial and as-applied challenges), with Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*,

court disagreed with the Fifth Circuit's *Wickard* analysis and analogized personal possession of child pornography to the noneconomic activity in *Lopez* and *Morrison*.<sup>87</sup> However, rather than hold § 2252(a)(4)(B) facially unconstitutional, the court held "the statute [unconstitutional] as applied to McCoy's conduct as it falls within a *class of activity* that § 2252(a)(4)(B) purports to reach."<sup>88</sup> Thus, the majority found McCoy not liable without expressly rejecting the statute.<sup>89</sup> The Ninth Circuit's treatment of § 2252(a)(4)(B), finding the statute constitutional except for in instances when the criminal defendant acted similar to how McCoy acted, is directly related to the court's application of the *as-applied* doctrine.<sup>90</sup>

## 2. FACE Act and the Bird Decisions

In August 2003, the Southern District of Texas applied *Morrison* to the Freedom of Access to Clinic Entrances (FACE) Act.<sup>91</sup> The FACE Act criminalizes activity construed as both "intentionally injur[ing], intimidat[ing], or interfer[ing] . . . with any person because that person is or has been . . . obtaining or providing reproductive health services" as well as "intentionally damag[ing] or destroy[ing] the property of a facility . . . [that]

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113 HARV. L. REV. 1371 (2000) (responding to Prof. Fallon by asserting that personal rights are not violated despite the use of invalid rules). Facial challenges restrict courts to judging the constitutionality of statutes on the whole. Professor Peter J. Henning notes that only two types of facial challenges exist, those under the Overbreadth Doctrine, which prohibits statutes that impermissibly infringe on First Amendment free speech rights, and those under the "valid rule" claim. See Henning, *supra*, at 431-32 (citing Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (1981)). The "valid rule claim" is a doctrine stating that litigants are entitled to be judged per a constitutional rule of law and that rules beyond the lawmaker's authority are unenforceable. See *id.* at 432-33. In contrast, *as-applied* challenges grant power to the courts to judge constitutionality on a case-by-case basis.

<sup>87</sup> See *McCoy*, 323 F.3d. at 1120-23 (distinguishing McCoy's private possession with *Wickard*'s possession of home-grown wheat that reduced market demand and had a corresponding effect on price).

<sup>88</sup> *Id.* at 1132.

<sup>89</sup> See *id.* at 1132-33. In so holding, the majority highlights that sister circuits have similarly attacked 18 U.S.C. § 2252(a)(4)(B) on *as-applied* grounds. *Id.* at 1130 n.28 (citing *United States v. Corp*, 236 F.3d 325, 329 (6th Cir. 2001)); see Henning, *supra* note 86, at 438-39 (discussing how the *Corp* court upheld § 2252(a)(4)(B) as a valid application of Commerce Clause power, yet found that the statute could not be applied to the defendant). Unlike the Fifth Circuit in *Kallestad* and the Second Circuit in *Holston*, neither the Sixth Circuit in *Corp* nor the Ninth Circuit in *McCoy* held the rule to be an invalid application of Commerce Clause power. Rather, these courts held that principles of federalism required the defendants to be found not guilty despite the law. See Henning, *supra* note 86.

<sup>90</sup> For an explanation of what caused the conflict between the Fifth Circuit's *Kallestad* decision and the Ninth Circuit's *McCoy* decision, see *infra* text accompanying notes 105-17.

<sup>91</sup> Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (1994).



provides reproductive health services.”<sup>92</sup> In 1994, Frank Bird, a known radical pro-life activist, threw a bottle at the windshield of a car driven by an abortion provider driving into the parking lot of the America’s Women Clinic in Houston.<sup>93</sup> Bird was arrested, charged with, and convicted of violating § 248(a).<sup>94</sup> He raised a defense that the FACE Act was an unconstitutional use of Congress’s Commerce Clause power.<sup>95</sup> The Fifth Circuit applied the newly created *Lopez* test and held that § 248(a) could only survive a Commerce Clause attack upon satisfaction of the Substantial Effects Category.<sup>96</sup> The Fifth Circuit’s decision in this case came three years before *Morrison*, meaning that the court did not have the benefit of the Supreme Court’s express adoption of the Economic Activity Test and rejection of such heavy reliance on Congressional findings.<sup>97</sup> However, the *Lopez* Court noted the relationship between economic activity statutes deemed constitutional,<sup>98</sup> the Fifth Circuit interpreted this language to mean that findings of Congress of the economic consequences of criminal behavior are sufficient. The court held, supported by Congressional findings of the economic impact of violence near abortion clinics, that § 248(a) “is a legitimate regulation of intrastate activity having a substantial affect on interstate commerce.”<sup>99</sup> Bird served a year in prison for his actions.<sup>100</sup>

In March 2003, Bird drove a van into the front entrance of a Houston Planned Parenthood Clinic, again in violation of § 248(a).<sup>101</sup> Bird, who again asserted a defense that the FACE Act is unconstitutional, was tried in the Southern District of Texas.<sup>102</sup> Similar to the evidence Congress presented to support the VAWA, evidence was presented of the economic

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<sup>92</sup> 18 U.S.C. § 248(a).

<sup>93</sup> *United States v. Bird (Bird I)*, No. 95-20792, 1997 U.S. App. LEXIS 33988, at \*2-\*3 (5th Cir. Sept. 24, 1997); see Eric Lichtblau, *Ashcroft to Defend Ban on Some Abortion Protests, Angering His Longtime Allies*, N.Y. TIMES, Aug. 30, 2003, at A12 (noting repeated arrests of Mr. Bird in Houston throughout the past decade).

<sup>94</sup> See *Bird I*, 1997 U.S. App. LEXIS 33988, at \*2.

<sup>95</sup> *Id.* at \*7.

<sup>96</sup> *Id.* at \*19 (summarizing the Act’s failure to qualify as constitutional under the first two *Lopez* prongs).

<sup>97</sup> See *United States v. Morrison*, 529 U.S. 598, 610, 614 (2000).

<sup>98</sup> See *United States v. Lopez*, 514 U.S. 549, 560 (1995).

<sup>99</sup> *Bird I*, 1997 U.S. App. LEXIS 33988, at \*28.

<sup>100</sup> *Id.* at \*3.

<sup>101</sup> See *United States v. Bird (Bird II)*, 279 F. Supp. 2d. 827 (S.D. Tex. 2003); S.K. Bardwell, *Charges Against Abortion Protester Dismissed*, THE HOUSTON CHRON., Aug. 20, 2003, at A23 (“Bird, a well-known abortion protester, told authorities he conducted the crash to ‘stop the killing.’”).

<sup>102</sup> *Bird II*, 279 F. Supp. 2d. at 828.

and commercial impact of intimidation tactics used by anti-abortion protestors at clinics.<sup>103</sup> Buoyed by the *Morrison* decision, the District Court analogized this evidence to the evidence of the economic impact of gender abuse in support of the VAWA. Relying on the *Morrison* Court's holding that evidence of an activity's economic effects on society is alone inadequate to find that activity "economic," the District Court decided that the evidence of societal economic effects of violence at abortion clinics alone was insufficient to satisfy Substantial Effects.<sup>104</sup> Even though the Fifth Circuit, in an almost identical fact pattern concerning the same defendant, held that the FACE Act is a constitutional application of the Commerce Clause, the Southern District of Texas, jurisdictionally bound by Fifth Circuit precedent, found the FACE Act facially unconstitutional.<sup>105</sup> Yet *Morrison* restated the limitations provided in *Lopez*, upon which the Fifth Circuit based its *Bird I* decision in 1997. Additionally, the Fifth Circuit had not been mute on Commerce Clause issues since *Morrison*, deciding *Kallestad* in reliance upon that decision. Thus, the Southern District decided *Bird II* against both the Fifth Circuit's *Bird I* precedent and precedent created in reliance on *Morrison*.<sup>106</sup>

Thus far, two splits regarding federal statute constitutionality have been highlighted. One involves regulating mere possession of "home-grown" pornography, and one involves regulation of entrances to abortion clinics. The limited Economic Activity interpretation proposed by this paper requires that, to regulate economic activity, a law must either directly affect or have the purpose of directly affecting a valuable transaction. The *Kallestad* Court, by relying entirely on Congressional findings, held that 18

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<sup>103</sup> *Id.* at 836-37; see also *Bird I*, 1997 U.S. App. LEXIS 33988, at \*29-\*30 (relying significantly on Congressional findings in order to uphold FACE as constitutional). Note that unlike the Fifth Circuit, the District Court for the Southern District of Texas had the benefit of the standards provided in *Morrison* to aid in the constitutionality issue.

<sup>104</sup> See *Bird II*, 279 F. Supp. 2d. at 836 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (quoting *United States v. Morrison*, 529 U.S. 598, 614 (2000))).

<sup>105</sup> *Bird I*, 1997 U.S. App. LEXIS 33988, at \*28; *Bird II*, 279 F. Supp. 2d. at 837-38 (finding no broader economic regulation using the FACE, "no rational basis for finding that a substantial relationship exists between the regulated activity and commerce," and "no intrastate commercial activity generated by the anti-abortion activities that arguably generates funds for other criminal activity that is interstate in nature").

<sup>106</sup> Aside from the jurisprudential chaos currently existing, the effects of *Bird II* have also been political. Attorney General John Ashcroft has announced intentions to appeal the Southern District's decision, threatening to alienate social conservatives from whom both Ashcroft and the Republican Party have received support. See Lichtblau, *supra* note 93. Ashcroft defended his stance, stating that he "well understand[s] that the role of attorney general is to enforce the law as it is, not as [he] would have it." *Id.*

U.S.C. § 2252(a)(4)(B) was a regulation of economic activity,<sup>107</sup> an analysis explicitly rejected in *Morrison*.<sup>108</sup> The *McCoy* Court found no economic activity in the defendant's possession of homemade child pornography, since McCoy's picture did not affect *demand* in the child pornography market.<sup>109</sup> The Fifth Circuit in *Bird I* decided that the FACE Act is a "legitimate regulation of intrastate activity having a substantial affect on interstate commerce" based entirely upon Congressional findings.<sup>110</sup> Yet the *Bird II* Court, rejecting the sufficiency of Congressional findings, stated that the FACE Act was not a regulation of economic activity.<sup>111</sup>

Two causes for the circuit splits are evident. First, both the *Lopez* and *Morrison* majority opinions reflect the Chief Justice's terse writing style, which had the effect here of creating enormous room for interpretive variance. *Lopez* and *Morrison* may be read, for instance, to only apply to laws so ridiculously unrelated to commerce that the Court cannot remain mute. Even more broadly interpreted, the Court's reliance on case-by-case adjudication may reflect a wish to limit the cases to their facts. Most likely, however, the Chief Justice wrote the opinions with so much interpretive room in order to retain his majority.<sup>112</sup> The *Kallestad*, *McCoy*, *Bird I*, and *Bird II* Courts were all structurally consistent with *Lopez*, and even though the *Bird II* Court stated otherwise, all the courts including *Bird I* were structurally consistent with *Morrison* as well. Unfortunately, the interpretive "wiggle room" has allowed the lower courts to ignore the purpose of *Lopez* and *Morrison*, which impose an outer bound on Congressional Commerce Clause power.<sup>113</sup>

Second, the Supreme Court used criminal cases to state the Economic Activity limitation on the Substantial Effects Category, an awkward mode

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<sup>107</sup> See *United States v. Kallestad*, 236 F.3d 225, 228 (5th Cir. 2000) (relying on the 1986 Attorney General Commission on Pornography, stating "much of the interstate traffic in child pornography involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers").

<sup>108</sup> See *Morrison*, 529 U.S. at 614 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

<sup>109</sup> See *United States v. McCoy*, 323 F.3d 1114, 1121-22 (9th Cir. 2003) ("The picture . . . which McCoy possessed for her own personal use did not 'compete' with other depictions . . . in the illicit market for child pornography and did not affect their availability or price."). The court also rejected four arguments posed by the Third Circuit. See *id.* at 1121-22 (quoting *United States v. Rodia*, 194 F.3d 465, 477-78 (3d Cir. 1999)).

<sup>110</sup> See *Bird I*, 1997 U.S. App. LEXIS 33988, at \*28.

<sup>111</sup> See *United States v. Bird (Bird II)*, 279 F. Supp. 2d 827, 837 (S.D. Tex. 2003).

<sup>112</sup> See *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy and O'Connor, J.J., concurring) (opining a review of traditional state functions).

<sup>113</sup> See Denning & Reynolds, *supra* note 67, at 1299-1303.

at best by which to check the Commerce Clause power Congress wields.<sup>114</sup> The tests were articulated in criminal law suits in order to send the message that Congressional Commerce Clause authority is vast. Conceptually, a sphere of authority exists within which Congress, at a minimum, has regulatory power over transactions, contracts, and general trade. Congress has incentives to seek a much larger sphere, one maximizing its political power. *Lopez* and *Morrison* provide evidence of an outer limit—a maximum size—for the sphere. However, whether Congress has authority up to the limits imposed by these two cases, or whether the cases fall substantially beyond the regulatory sphere's outer bound remains unknown. With regard to deciding this question, many of the lower courts have been deferential to Congressional authority.<sup>115</sup> However Congress, which wants maximum political authority, is not appropriately situated to dictate the outer bound of its own Commerce Clause power. To think otherwise contradicts the express intent of the Framers!<sup>116</sup>

More importantly, those courts that have disagreed with Congress have applied arbitrary tests, with neither support for their validity nor explanation of their operation.<sup>117</sup> These arbitrary measures violate the judiciary's need for the rule of law to be paramount to other interests, like fairness and societal optimality, goals best advanced by the other branches of

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<sup>114</sup> See Bradley, *supra* note 8, at 575-76 (“[I]t appears that the Court’s goal is to rein in federal jurisdiction in cases where the Court’s majority deems it unnecessary to the principal purposes and goals of federal law enforcement while not disturbing the government’s ability to vindicate its key concerns.”). But cf. McGinnis, *supra* note 3, at 518-19. Prof. McGinnis gives two alternative explanations for the Court’s decision to create Commerce Clause limits through criminal law. First, too much precedent exists for the Court to impose a sudden return to the pre-New Deal restrictive interpretation of the Commerce Clause. See *id.* at 518 (citing Prof. Robert Bork, “hardly a friend of New Deal jurisprudence, [who] has stated, to overturn the precedent on Congress’s regulatory authority over economic matters would be ‘to overturn much of modern governance and plunge us into chaos’”). Second, Commerce Clause limits may be imposed on Congress through noneconomic criminal matters with less controversy, “thus creating fewer political risks for the Supreme Court.” See *id.* at 519 (“Relatively few people are going to march to the barricades over the gun carrying law at issue in *Lopez* or even the gender discrimination law at issue in *Morrison*. Thus, a fundamental explanation for the Court’s creation of space for noneconomic civic society is that it is simply an easier political task.”).

<sup>115</sup> E.g., *United States v. Holston*, 343 F.3d 83, 88 (2d Cir. 2003); *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000); *Bird I*, 1997 U.S. App. LEXIS 33988, at \*31.

<sup>116</sup> See THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>117</sup> See *United States v. McCoy*, 323 F.3d 1114, 1122 (9th Cir. 2003) (applying an “effect on demand” test to determine that McCoy’s photograph did not “compete” in the child pornography market and was thus “was purely non-economic and non-commercial”). For a thorough analysis regarding the causes of lower court application of arbitrary rules and quick abdication to Congress, see Denning & Reynolds, *supra* note 67, at 1299-1303.

government.<sup>118</sup> For instance, the *McCoy* Court explained that the defendant's photograph did not "compete" in the larger, national child pornography market.<sup>119</sup> Yet the question raised by the Commerce Clause challenge is whether the law is constitutional, not whether regulation of the particular defendant's activity under the purview of the law is constitutional. Furthermore, how one is to determine in the Ninth Circuit, after *McCoy*, whether a particular good or activity "competes" in the national market remains a mystery. After a review of one additional statute is undertaken, this paper's limited Economic Activity interpretation will be used to clear the murk.

### 3. *The Constitutionality of Prohibiting the Creation of Home-Grown Machine Guns and United States v. Stewart*<sup>120</sup>

Robert Stewart, who had previously been convicted of possession and trade of illegal firearms, advertised the sale of machinegun components in national publications.<sup>121</sup> Alcohol, Tobacco, Firearms, and Explosives (ATF) agents, based on these advertisements and undercover operations, searched Stewart's home and found thirty-one firearms, which included five homemade machineguns.<sup>122</sup> Stewart was charged and convicted of trading machinegun components as well as possessing machineguns.<sup>123</sup> Stewart, on appeal to the Ninth Circuit, challenged his conviction for possession of his homemade machineguns per 18 U.S.C. § 922(o) on grounds that Congress is without the authority to regulate mere possession of machineguns.<sup>124</sup>

The Ninth Circuit first reviewed the *Lopez* factors and determined that § 922(o) could only be constitutional by having a substantial effect on interstate commerce.<sup>125</sup> Then, applying the four *Morrison* factors, the court

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<sup>118</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175-76 (1989).

<sup>119</sup> See *McCoy*, 323 F.3d at 1122.

<sup>120</sup> 348 F.3d 1132 (9th Cir. 2003).

<sup>121</sup> *Id.* at 1133.

<sup>122</sup> *Id.* at 1133-34 ("In addition to numerous rifle kits, the ATF search also turned up thirty-one firearms, including five machineguns. The machineguns had been machined and assembled by Stewart.").

<sup>123</sup> *Id.* at 1134. Section 922(o) simply states that "it shall be unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o) (2003).

<sup>124</sup> See *Stewart*, 348 F.3d at 1134; 18 U.S.C. § 922(o). Stewart was not charged with advertising his parts kits, and he did not challenge Congressional authority to regulate the transfer of machineguns. *Stewart*, 348 F.3d at 1134.

<sup>125</sup> See *Stewart*, 348 F.3d at 1134. The court had to limit a prior post-*Lopez* decision, which held § 922(o) constitutional under the "channel of commerce" prong of *Lopez*. In *United States v. Rambo*, the court held that § 922(o) is constitutional, relying on an

analogized Stewart's possession of the machineguns to Lopez's possession of the gun on school grounds, finding that § 922(o) similarly lacked any regulation of an economic activity.<sup>126</sup> The court followed the analysis in *McCoy*, stating that "Stewart's homemade machineguns did not stimulate a demand for anything illegal[,] . . . did not increase machinegun demand," and did not reduce overall demand in the machinegun market.<sup>127</sup> The court also distinguished *Wickard*, stating that the no evidence was presented that the regulation had more than an attenuated connection to interstate commerce.<sup>128</sup> The court went further, stating that the *purpose* of the regulation was not economic.<sup>129</sup> Yet rather than find § 922(o) facially unconstitutional, the court held that the statute was unconstitutionally applied to Stewart, parroting the approach taken by the *McCoy* majority.<sup>130</sup>

The *Stewart* Court adopted two of the same devices that the *McCoy* Court had used six months earlier. The court used the effects on market demand as an indicator of economic activity and also decided that § 922(o) was unconstitutional as applied to Stewart.<sup>131</sup> But unlike the *McCoy* Court, this court took a substantial step toward adjudicating the Economic Activity Test in a principled manner akin to what is proposed here. The court determined that the prohibition on machinegun possession per § 922(o) does not regulate economic activity.<sup>132</sup> This is the first prong of this paper's

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assumption that "a transfer or sale must have preceded the criminalized possession" of the prohibited firearm. *Id.* at 1134 (citing *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996)).

<sup>126</sup> See *id.* at 1137-39 (holding that, like the GFSZA, § 922(q) in *Lopez*, § 922(o) lacked any relationship to commerce or economic enterprise, however broadly those terms may be defined).

<sup>127</sup> See *id.* at 1138; *United States v. McCoy*, 323 F.3d 1114, 1122 (9th Cir. 2003).

<sup>128</sup> *Stewart*, 348 F.3d at 1137 ("Unlike in *Wickard* . . . , where growing wheat in one's backyard could be seen as a means of saving money that would otherwise have been spent in the open market, a homemade machinegun may be *part of a gun collection* or may be *crafted as a hobby*." (emphasis added)).

<sup>129</sup> *Id.* (stating that § 922(o) was likely "intended to keep machineguns out of the hands of criminals—an admirable goal, but not a commercial one").

<sup>130</sup> *Id.* at 1140 ("We therefore conclude that § 922(o) is unconstitutional as applied to Stewart."). Compare *McCoy*, 323 F.3d at 1129, 1133 ("[A] thorough review of the *Morrison* factors persuades us that, as applied to McCoy and others similarly situated, § 2252(a)(4)(B) cannot be upheld as a valid exercise of the Commerce Clause power."), with *McCoy*, 323 F.3d at 1133 (Trott, J., dissenting) (arguing that "the Supreme Court appears . . . to have ruled out 'as applied' challenges in Commerce Clause cases"), and *Sabri v. United States*, 124 S. Ct. 1941, 1949 (2004) (Kennedy & Scalia, J.J., concurring in part) (opining that *Lopez* and *Morrison* only provide for facial challenges).

<sup>131</sup> Parallel to the *McCoy* Court's decision, the *Stewart* Court avoided deciding whether 18 U.S.C. § 922(o) is facially unconstitutional.

<sup>132</sup> See *Stewart*, 348 F.3d at 1137 (stating that "[p]ossession of a machinegun is not, without more, economic in nature").

limited Economic Activity Test interpretation, which states that a regulation must directly affect a valuable transaction to be a regulation of an economic activity. The court did not need to say more than that the regulation was not economic, since no valuable transfer is required by the statute. Moreover, the *Stewart* Court also reviewed the purpose of the regulation, stating that "the regulation itself does not have an economic purpose."<sup>133</sup> This is the second prong of this paper's Economic Activity Test interpretation, which states that a regulation of a noneconomic activity must have the purpose of directly affecting a valuable transaction to be constitutional. The structure of and justifications for this paper's limited Economic Activity interpretation are discussed at length next.

### III. REFINING *MORRISON*'S ECONOMIC ACTIVITY TEST

A problem obviously exists with the current structure for adjudicating Commerce Clause attacks. The circuit courts have implemented *Lopez* and *Morrison* with unique and diverse constructs; the only common thread is a universal refusal to find any statute facially unconstitutional. The onus for consistent and principled application of the Supreme Court's interpretive shift in Commerce Clause doctrine<sup>134</sup> falls squarely with the appellate courts. So why should this paper's limited Economic Activity interpretation be considered any better than the others? After all, a number of useful and socially beneficial laws may be deemed unconstitutional under this interpretation. As an underlying motive for the paper, adherence to, and application of, the rule of law is considered paramount to all other judicial interests, such as fairness to individual defendants and societal optimality. The limited Economic Activity interpretation provides a robotic, unswerving test for Commerce Clause adjudication by the lower courts and also demarks a bound on the Congressional authoritative sphere consistent with *Lopez* and *Morrison*. This section is devoted to explaining the interpretation's merits over alternatives in addition to validating the interpretation through the use of past precedent.

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<sup>133</sup> See *id.*

<sup>134</sup> Compare Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 39 (1998) (arguing for a Congressional Intent Test, determining the motives of the legislature for the law, as a substitute for an effects test), with Regan, *supra* note 20, at 609 (construing the enumerated powers of Art. I, § 8 as a general framework for Federalism rather than as independent, limited realms of Congressional lawmaking authority).

#### A. REFINEMENT OF THIS PAPER'S LIMITED ECONOMIC ACTIVITY INTERPRETATION

The limited Economic Activity interpretation determines whether a regulation has a substantial effect on interstate commerce. First, a law that directly affects some exchange, transaction, or contract of value to all engaged parties is a regulation of an economic activity. Second, a law that has the purpose of regulating some exchange, transaction, or contract of value to all engaged parties is a regulation of an economic activity. In determining whether a law has the purpose of regulating valuable transactions, courts should review whether a jurisdictional element is employed as well as the intent of legislature for the law. A law that satisfies either the direct regulation or the purpose category substantially affects interstate commerce, thereby satisfying *Lopez* and *Morrison*.

The two *Morrison* factors, existence of a jurisdictional element and the legislative intent, are critical for determining whether an indirect regulation has the purpose of directly affecting economic activity. *Morrison*'s second factor is whether Congress has used a jurisdictional element in phrasing the law, which supports the "purpose" requirement in the following way. The jurisdictional element is typically phrased as a variant of the following: "the purchase or sale must be through interstate commerce." By imposing an "interstate commerce" requirement, Congress is limiting the law to activity that in some way involves commercial transactions. As such, the Congressional purpose more likely involves a specific commercial transaction to which the law is limited. The third *Morrison* factor is the legislative intent and history of the regulation. Of course, Congressional committees can "lie" in the drafting process and evince a purpose that satisfies this factor. However, the Supreme Court has reserved final judgment on whether a regulation is "economic" rather than deferring entirely to Congress.<sup>135</sup> Separately, though somewhat related, Congress can only believably lie to an extent. For instance, when enacting the VAWA, Congress could have demonstrated a need to halt violence against women for the purpose of preserving certain valuable transactions.<sup>136</sup> However, no reasonable court reviewing the constitutionality of the VAWA would have believed a statement that a statute passed for the general protection of women was enacted for the principal purpose of regulating valuable transactions.

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<sup>135</sup> See *United States v. Morrison*, 529 U.S. 598, 614 (2000).

<sup>136</sup> Ironically, Congress relied upon the findings of commercial effects as a justification for enacting the VAWA, which had the purpose of enhancing the general safety of women. See *id.* at 615. The VAWA neither directly regulates valuable transactions nor has the purpose of doing so.



The efficacy of these two factors in revealing the underlying purpose of a regulation is limited, and the two are more effective at exposing a law's shortcomings rather than its merits. However, the combined efficacy of these factors need not be a panacea for determining a law's purpose. They only must provide guidance and clarity to courts determining whether a law has the purpose of regulating valuable transactions.

This paper's interpretation has two limiting effects on *Morrison*. First, a court determining that the regulation at issue has a direct effect on a valuable transaction need not review the other *Morrison* factors. Second, the Attenuation Factor limits indirect regulation to only those laws that have the purpose of regulating valuable transactions. Congress may choose to regulate a noneconomic activity when the purpose of the law is to regulate valuable transactions—transactions best affected with direct regulation of some noneconomic activity.<sup>137</sup> Indirect regulation with purposes other than to affect valuable transactions do not satisfy the *Lopez* Substantial Effects Category; this is the significant limitation imposed by this interpretation.

## B. JUSTIFYING THE LIMITED ECONOMIC ACTIVITY INTERPRETATION

### 1. Broad Versus Limited Attenuation

Why should the Attenuation Factor of *Morrison* be interpreted narrowly to impose a purpose requirement on an indirect regulation, rather than allow for some indirect regulation that does not have the purpose of operating on an economic activity? Attenuation, according to the Supreme Court majority, was significant in the Court's determination that the VAWA was unconstitutional.<sup>138</sup> This fourth factor eliminates Congress's ability to simply state in legislative findings that a particular law affects some economic activity.<sup>139</sup> The Court could have limited the *Lopez* Substantial

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<sup>137</sup> Consider the following example of when Congress may pass a law with the purpose of regulating valuable transactions. Suppose that Congress wants to limit loans sharks from entering contractual agreements. Through detailed study, Congressional committees have discovered that the majority of these contracts are entered by attendees of high school football games who do not have children participating in the games. Congress also has discovered that the overwhelming majority of those patrons to high school football games that do not have children participating in the contests are in the audience specifically to conduct this business. Could Congress pass a law prohibiting spectators to high school football games who do not have children participating in the contests, assuming that entry to the football game was costless? Under the "purpose" prong, this would be a direct regulation of a noneconomic activity with the purpose of indirectly regulating valuable transactions between debtors and loan sharks.

<sup>138</sup> See *Morrison*, 529 U.S. at 615.

<sup>139</sup> *Id.* at 614-15 (stating that Congress's assertion that the VAWA had a substantial effect on economic activity "would allow Congress to regulate any crime as long as the

Effects Category to those laws having a direct effect on economic activity. In the Court's view, however, some laws that only have an indirect effect on economic activity are still constitutional; the Attenuation Factor defines that boundary.<sup>140</sup>

On the one hand, a broad interpretation of attenuation may be construed, permitting courts to judge in an ad hoc manner laws with neither a direct effect on economic activity nor the purpose of directly affecting economic activity.<sup>141</sup> In his well-known article, *The Rule of Law as a Law of Rules*, Justice Scalia lists five values for the rule of law: (1) maintaining "the appearance of equal treatment" with respect to litigants similarly situated; (2) strengthening the ability of the Supreme Court to maintain uniformity; (3) enhancing predictability; (4) diminishing judicial discretion; and (5) strengthening the ability of judges to enforce the law in the face of popular opposition.<sup>142</sup> A broad attenuation interpretation is inferior at satisfying these goals when compared to a limited interpretation, such as the one proposed here. For instance, under a broad interpretation of attenuation, a court could simultaneously find a law prohibiting the possession of machineguns constitutional but one prohibiting the possession of knives unconstitutional.<sup>143</sup> In this scenario, the machinegun possessor would at least appear to be disadvantaged<sup>144</sup> by possessing an illegal weapon designed to shoot rather than one designed to stab. Moreover, uniformity across the circuit courts could not be maintained under a broad interpretation,<sup>145</sup> predictability would be hopeless,<sup>146</sup> and judicial discretion would increase rather than diminish.<sup>147</sup> (Would the owner of an illegal rifle with a bayonet attached have a low or high probability of winning her Commerce Clause challenge?)

A broad interpretation of attenuation also inhibits Justice Scalia's fifth factor. In jurisdictions with a broad interpretation of attenuation, judges

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nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," if relied upon completely).

<sup>140</sup> See *id.* at 612.

<sup>141</sup> Given that the Chief Justice, joined by Justice Scalia, comprised the majority opinions in *Lopez* and *Morrison*, a broad, ad hoc analysis was not likely intended.

<sup>142</sup> Scalia, *supra* note 118, at 1178-80.

<sup>143</sup> This could happen if, using the Ninth Circuit's "effects on market demand" approach, each additional machinegun affected the demand in the national machinegun market but each additional knife, like McCoy's child pornography, did not affect the overall market demand, even in the aggregate.

<sup>144</sup> This is Justice Scalia's first factor. See Scalia, *supra* note 118, at 1178.

<sup>145</sup> This is Justice Scalia's second factor. See *id.* at 1179.

<sup>146</sup> This is Justice Scalia's third factor. See *id.*

<sup>147</sup> This is Justice Scalia's fourth factor. See *id.* at 1179-80.

have both more authority and more responsibility to review case-by-case. But this responsibility weakens the ability of judges to enforce unpopular laws, and alternatively, weakens the ability of judges to reject popular laws. A judge reviewing a case in which a defendant is liable per a popular but unconstitutional law, which indirectly affects valuable transactions with no purpose of doing so and which is in a jurisdiction where only a limited attenuation interpretation exists, has the power—more appropriately, has the obligation—to find the law unconstitutional. But if the same defendant is tried in a jurisdiction where a broad interpretation carries the day, the judge is exposed to political pressure to find the law to be not too attenuated. A broad interpretation of attenuation weakens this judge's power to make unpopular decisions.

In contrast, a limited interpretation of attenuation reduces, and may even eliminate, these concerns. A limited interpretation adds consistency among similarly situated litigants, adds uniformity and predictability to constitutionality reviews, decreases judicial discretion and correspondingly enhances judicial ability to make unpopular decisions. Furthermore, a limited interpretation of attenuation clarifies the requirements for Congress when making new law, assuming that Congress never wants a statute to be deemed unconstitutional by the courts. Under the limited Economic Activity interpretation proposed here, the Attenuation Factor of *Morrison* limits laws with only indirect effects on economic activity to those with the purpose of directly affecting economic activity. This interpretation allows Congress to indirectly regulate economic activity, but only in a principled and structured manner.

## 2. *Circumventing the As-Applied Doctrine Under the Limited Economic Activity Interpretation*

As-applied challenges<sup>148</sup> were used by the Sixth Circuit in *Corp*,<sup>149</sup> by the Ninth Circuit in both *McCoy* and *Stewart*,<sup>150</sup> and by the *Kallestad* dissent.<sup>151</sup> Conversely, the Fifth Circuit's *Kallestad* majority rejected an as-applied challenge regarding the defendant's intrastate possession of homemade child pornography,<sup>152</sup> the Second Circuit reaffirmed its blanket

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<sup>148</sup> For a discussion of the As-Applied Doctrine, see *supra* note 86.

<sup>149</sup> *United States v. Corp*, 236 F.3d 325, 332 (6th Cir. 2001).

<sup>150</sup> *United States v. Stewart*, 348 F.3d 1132, 1140 (9th Cir. 2003); *United States v. McCoy*, 323 F.3d 1114, 1133 (9th Cir. 2003).

<sup>151</sup> *United States v. Kallestad*, 236 F.3d 225, 231 (5th Cir. 2000) (Jolly, J., dissenting).

<sup>152</sup> *Id.*

rejection of the As-Applied Doctrine in *Holston*,<sup>153</sup> and the *McCoy* dissent rejected use of the As-Applied Doctrine specifically in Commerce Clause adjudication.<sup>154</sup> A doctrine that eliminates the courts' ability to analyze statutes on an as-applied basis, at least within the confines of Commerce Clause jurisprudence, has merit. When a court decides that a law is unconstitutional as applied to a party, the bulk of the law still remains. As-applied challenges carve pockets of activity out of the original law passed by Congress. What remains is a decrepit form of the original regulation—weakened, but not entirely vanquished.

Two significant problems exist with as-applied constitutionality, at least with respect to Commerce Clause challenges. First, although both *Lopez* and *Morrison* were written broadly and leave much room for interpretation, the tests created in the two cases left no possibility for as-applied reviews.<sup>155</sup> *Lopez* asks courts to judge whether the *law* being attacked can be categorized in one of the case's three classes. *Morrison* asks courts to review four factors related to structure and function in order to determine whether the *law* has a substantial effect on interstate commerce. Neither case asks whether the criminal defendant's activity was itself either economic or one with a substantial effect on interstate commerce. That Alfonso Lopez brought his gun to school for the purpose of making a sale was irrelevant to the *Lopez* Court, precisely because the test for whether a law is constitutional under the Commerce Clause is not

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<sup>153</sup> *United States v. Holston*, 343 F.3d 83, 90-91 (2d Cir. 2003) (holding that incidental intrastate activity within a class of interstate regulation is subject to the same regulation as the interstate regulation).

<sup>154</sup> *McCoy*, 323 F.3d at 1137 (Trott, J., dissenting) ("[T]he resolution of this case boils down to whether the statute under review, . . . which encompasses a certain kind of intrastate possession, passes *Commerce Clause* muster, *not* whether McCoy's categorically peculiar circumstances have a pellucid nexus to interstate commerce.").

<sup>155</sup> See *Sabri v. United States*, 124 S. Ct. 1941, 1949 (2004) (Kennedy & Scalia, J.J., concurring in part). For a summary of the relevant issues addressed in *Sabri*, see *supra* note 63. In his concurring opinion, Justice Kennedy responded to the majority's "afterword on Sabri's technique for challenging his indictment by facial attacks on the underlying statute." *Id.* at 1948 ("[F]acial challenges are best when infrequent."). Justice Kennedy commented that, although the majority noted a general aversion to facial challenges, this aversion does not question the practice followed in *Lopez* and *Morrison*. *Id.* at 1949 (Kennedy & Scalia, J.J., concurring in part). In *Lopez* and *Morrison*, "the Court did resolve the basic question whether Congress, in enacting the statutes challenged there, had exceeded its legislative power under the Constitution." *Id.* (Kennedy & Scalia, J.J., concurring in part). In other words, at least Justices Kennedy and Scalia view *Lopez* and *Morrison* as only creating the ability for facial challenges, thereby precluding parties from raising as-applied Commerce Clause challenges.

dependant on the actual activity of the defendant.<sup>156</sup> As-applied challenges, however, almost by definition review not the underlying law or regulation but rather the activity of the individual defendant. Since *Lopez* and *Morrison* are concerned solely with the law and not with each particular defendant's conduct, as-applied challenges have no place in this rubric.

Blind abdication to the *Lopez* and *Morrison* structure is a necessary basis on which this paper is founded, at least where an unambiguous direction was taken by the Court, such as with the application of as-applied challenges. The lower courts have consistently returned to the tests of these two cases for a skeletal framework, if not substantive guidance, when adjudicating Commerce Clause challenges. However, an alternative justification exists for excluding as-applied challenges from Commerce Clause doctrine. As stated above, the primary pursuit of judges should be to apply the rule of law.

Justice Scalia is asked to perform double-duty here, since the reasoning for rejecting the As-Applied Doctrine in Commerce Clause challenges parallels that for preferring a limited interpretation of attenuation to a broad interpretation.<sup>157</sup> Admittedly, within any given circuit, a subsequent defendant *identically* situated to a prior defendant who won an as-applied challenge will not be liable under the same law. The activity of the subsequent defendant, identical to the prior defendant, falls within the cove of activity isolated from the remaining law after the as-applied challenge. However, a third defendant, who is only *similarly* situated to the two prior defendants, may still be exposed to the original law's remnants. For instance, if Charles Kallestad is charged today in the Ninth Circuit for new activity identical to his conduct in Texas,<sup>158</sup> he would not be protected by the Ninth Circuit's *McCoy* decision, which only carved possession of a single item of homemade child pornography out of 18 U.S.C. § 2252(a)(4)(B). The first four of Justice Scalia's rule of law values are implicated here. The similarly situated defendant, like Kallestad in the Ninth Circuit, has neither a certainty nor even a significantly high probability of equal treatment. Predictability is affected short of the Kallestad defendant being guaranteed equal treatment to that of *McCoy*, and the current circuit splits demonstrate uniformity shortcomings. Furthermore, judicial discretion increases with as-applied challenges, since

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<sup>156</sup> *Contra Ides*, *supra* note 20, at 569 (arguing that, if economic activity is to be the new proxy for commerce, the Court conveniently ignored that *Lopez* intended to engage in an economic transaction).

<sup>157</sup> See Scalia, *supra* note 118, at 1178-80; see also *supra* notes 143-47 and accompanying text.

<sup>158</sup> For an explanation of Kallestad's conduct, see *supra* Section II.B.1.

judges have the authority both to determine whether to apply an as-applied challenge or facial challenge as well as to determine the extent to which the as-applied challenge will diminish the scope of the law at issue.<sup>159</sup>

As-applied challenges negatively affect Justice Scalia's fifth value as well. Jurisdictions where as-applied challenges are permitted force judges to determine on a case-by-case basis whether a particular as-applied challenge is appropriate and to decide the extent to which the law affected is to be reduced in efficacy.<sup>160</sup> In these jurisdictions, judges have both more authority and more responsibility due to the permissibility of as-applied challenges. But this responsibility both weakens the ability of judges to enforce unpopular laws and weakens the ability of judges to reject popular laws. A judge reviewing a case in which a defendant is liable per a popular but unconstitutional law, in a jurisdiction where only facial challenges are permitted, has the obligation to find the entire law facially unconstitutional. But if the same defendant is tried in a jurisdiction permitting both facial and as-applied challenges, although this defendant should be found not guilty, the judge is exposed to political pressure to find the law unconstitutional only as applied and leave in tact the rest of the unconstitutional law. Excluding as-applied challenges, at least for Commerce Clause challenges, strengthens the power of courts to make unpopular decisions.<sup>161</sup> Unfortunately, the current standards by which several lower courts have applied *Lopez* and *Morrison* inappropriately permit their use.

The limited Economic Activity interpretation proposed here is one such analysis that, without needing the Supreme Court to universally reject the As-Applied Doctrine, eliminates the ability for defendants to capitalize on these challenges.<sup>162</sup> According to Professor Richard Fallon, as-applied

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<sup>159</sup> For example, the *McCoy* Court found 18 U.S.C. § 2252(a)(4)(B) unconstitutional as applied to both *McCoy* and other similarly situated defendants. *McCoy*, 323 F.3d at 1131.

<sup>160</sup> See *id.*

<sup>161</sup> In a similar sense, prohibiting as-applied challenges "shuts off the courts as an avenue for social change." Cf. Thomas Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509, 522 (1996) (referencing Professor Robert Bork and British politician Edmund Burke). Although Professor Merrill's paper advances "conventionalism" as a conservative alternative to originalism, prohibiting as-applied constitutional challenges has parallel conservative results. His conventionalism justifications bear equally on justifications for excluding as-applied challenges:

We tend to think of activist judges as the great antithesis of democratic governance, and a judiciary [void of as-applied Commerce Clause challenges] would be a very inhospitable place for judicial activism. Just think of what stodgy and boring places courts would become [absent these challenges], what with judges thumbing through precedents of lower courts and surveying state statutes and other uninspiring sources!

*Id.* at 522.

<sup>162</sup> See sources cited *supra* note 86.

challenges are the consequence of particular doctrinal structures applied by the courts.<sup>163</sup> A change in the applied law, such as adoption of the limited Economic Activity interpretation, may shift constitutional review from an ad hoc as-applied analysis to an analysis that facially reviews the constitutionality of a law.<sup>164</sup> The limited Economic Activity interpretation involves a series of iterated questions.<sup>165</sup> Does the law directly affect an exchange, transaction, or contract of value to all parties? If not, does the law have the purpose of affecting such a valuable transaction? Does the structure of the statute employ a jurisdiction element, or does the legislative history lend support to the regulation's asserted purpose? These questions directly address the regulation and do not inquire into the defendant's conduct with respect to the regulation.<sup>166</sup> Under this interpretation of the Economic Activity Test, defendants have no space within which to assert a defense that the law is unconstitutional as applied to their conduct, leaving only "valid rule" facial challenge in a criminal defense lawyer's arsenal.<sup>167</sup>

This is not to say that defendants are without recourse. A defendant always has an option to assert a statutory interpretation defense that the law in question does not apply to the conduct for which he or she is charged. In one sense, this may sound remarkably similar to an explanation of the As-Applied Doctrine and may seem to be nothing more than a semantics argument. However, significant differences exist between the two approaches. With an as-applied challenge, the defense asserts that a particular law has been unconstitutionally applied to his or her case.

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<sup>163</sup> See Fallon, *supra* note 86, at 1321. Prof. Fallon argues that, conceptually, facial challenges and partial facial challenges are nothing more than special cases of as-applied challenges. Compare *id.* at 1324, with Henning, *supra* note 86, at 433 (arguing that a "valid rule" challenge, which attacks the constitutionality of a law on grounds that Congress does not have the authority to make the law, is a facial challenge independent of the facts surrounding the defendant's case).

<sup>164</sup> See Henning, *supra* note 86, at 436 ("With no Supreme Court analysis about how federalism should be applied, lower courts have asserted their authority to enforce the permissible line on a case-by-case basis, engaging in a type of ad hoc review of individual prosecutions to ensure that the proceeding involves a matter that is truly national.") (internal quotations omitted).

<sup>165</sup> See *supra* Section III.A.

<sup>166</sup> The interpretation falls under Professors Monaghan's and Henning's "valid rule" category of facial challenges, since the challenge asks whether Congress had Commerce Clause authority under *Lopez* and *Morrison* to make the law in question. See Henning, *supra* note 86, at 432-33 (citing Monaghan, *supra* note 86, at 3); cf. *United States v. McCoy*, 323 F.3d 1114, 1135 (9th Cir. 2003) (Trott, J., dissenting) ("[T]he de minimis nexus of Rhonda McCoy's personal activity to interstate commerce is of 'no consequence,' so long as (1) her conduct falls within the purview of the statute, as she has stipulated, and (2) the statute itself which covers that activity is valid.").

<sup>167</sup> See Henning, *supra* note 86, at 432-33.

Congress may draft laws very broadly with the intention of having the courts chip away at the scope through As-Applied challenges. For instance, if Congress were to pass a law federalizing all homicide,<sup>168</sup> the law would be enforced until found unconstitutional by the courts. But after the first as-applied challenge was raised and sustained, the entire law would still have force, except for the space where the law was found not to apply to the particular defendant's actions.

Conversely, with a "valid rule" facial challenge, such as the only available Commerce Clause challenge remaining under the limited Economic Activity interpretation, the defendant may raise two defenses. The defendant may argue that the law exceeds the Congressional authority granted in the Constitution. Alternatively, the defendant may argue that the his or her conduct is beyond the scope of the law, which is not a constitutional challenge at all. In this scenario, Congress cannot draft law very broadly, because the first constitutional attack raised would be a facial challenge with the potential to reject the entire law. Even if a law is found facially constitutional, the scope of the law may still be too narrow to capture the defendant's conduct. If Congress passed a law federalizing all homicide, the first case challenging the new law would result in the entire law being held unconstitutional as exceeding Commerce Clause authority. If, instead, Congress passed a law federally criminalizing all transactions in which an assassin is hired to perform a homicide, then the law would likely survive a facial Commerce Clause challenge.<sup>169</sup> However, a criminal defendant would have the ability to show that his or her conduct was not of the type regulated by the law.<sup>170</sup>

The facial challenge that results from the limited Economic Activity interpretation is consistent with the Supreme Court's requirement for Commerce Clause constitutionality review through a "case-by-case inquiry."<sup>171</sup> Rather than review the constitutionality of a law as applied to

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<sup>168</sup> Thankfully, Congress has not yet attempted to acquire a police power so rooted in the traditional functions and responsibilities of the States.

<sup>169</sup> This example is not meant to imply that Congress would ever realistically have a reason to pass such a law. Rather, the example is only meant to show how the limited Economic Activity interpretation operates. Note that Congress would have the power to make this law under both the limited Economic Activity interpretation proposed by this paper as well as any of the broader interpretations of *Morrison* currently applied by the lower courts.

<sup>170</sup> Perhaps the particular criminal defendant murdered his business partner regarding a disputed debt owed by their business.

<sup>171</sup> See *United States v. Lopez*, 514 U.S. 549, 561 (1995). Scholars have interpreted *Lopez* as providing structured tests for Commerce Clause constitutionality, notwithstanding the Court's mandate for a "case-by-case inquiry." See, e.g., Fried, *supra* note 4, at 39 (predating *Morrison*).



the defendant's conduct, the review merely asks whether the law is sufficiently broad to criminalize the defendant's actual conduct. This approach removes the burden from the courts in addressing constitutionality of every Commerce Clause law as applied to every defendant, instead placing the burden on Congress. Congress must perform an optimization, on the one hand broadening a law to capture the most possible conduct, countered on the other hand by a threat of having the entire law, if unconstitutionally broad, declared wholly unconstitutional.

### 3. *Summary of the Limited Economic Activity Interpretation's Benefits*

A summary of the benefits derived under the limited Economic Activity interpretation is in order. First, the interpretation is among the many interpretations consistent with *Lopez* and *Morrison*, a necessary condition if this paper is to have any real persuasive force among the lower courts. Second, the interpretation limits the *Morrison* factors, particularly the Attenuation Factor, in a structured and principled manner. In doing so, the interpretation raises creation of and abidance by a rule of law above other judicial goals. The interpretation is also superior to a broad interpretation of *Morrison* at satisfying Justice Scalia's five factors for assessing various rules of law. Finally, the interpretation eliminates the ability of defendants to raise as-applied constitutional challenges, thereby limiting defendants' defenses to facial challenges coupled with statutory interpretation arguments. As with a narrow interpretation of attenuation, a doctrine, such as the one proposed here, that eliminates as-applied challenges better satisfies Justice Scalia's factors than a doctrine that does not.

### C. VALIDATION THROUGH PAST SUPREME COURT PRECEDENT

The Court, in both *Lopez* and *Morrison*, reaffirmed the post-New Deal Commerce Clause cases, stating that an outer bound had always existed despite ever-increasing expanses of authority under the Clause.<sup>172</sup> This paper's limited Economic Activity interpretation must consistently yield the outcomes reached by the Court over the past sixty years. In order to have any persuasive power among the lower courts, this paper, founded on the premise that the lower courts will abide by *Lopez* and *Morrison*, must defer to those cases, which did not overturn a single New Deal or post-New Deal

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<sup>172</sup> See *Lopez*, 514 U.S. at 556-57 (noting that "outer limits" have always existed on Congressional authority under the Commerce Clause); *Morrison*, 598 U.S. at 608 (confirming the principles stated in *Lopez*).

Commerce Clause decision. *Wickard v. Filburn*,<sup>173</sup> “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,”<sup>174</sup> will be analyzed first, followed by *Perez v. United States*, addressing federal loan sharking statutes.<sup>175</sup> The former concluded the transformation of the Commerce Clause from an enumerated power to regulate “commerce” into a virtual plenary power to regulate “economics.”<sup>176</sup> The latter is a Commerce Clause criminal action, validating this paper’s interpretation in a criminal suit.<sup>177</sup>

*Wickard* addressed the constitutionality of the Agricultural Adjustment Act, which placed limits on the amount of wheat a farm could produce in a given season.<sup>178</sup> Specifically, the Act controlled the volume of wheat traded in interstate commerce as a means of regulating price through regulating supply.<sup>179</sup> Again, the approach employed under the limited Economic Activity interpretation is first to determine whether the regulation directly affects a valuable transaction. The Act here directly regulates the production of wheat, which, as in *Filburn*’s case, is not always traded in interstate commerce. Regulation of production with no requirement for a subsequent trade does not directly affect a valuable transaction. The second step is now invoked, and a review of the regulation’s purpose is undertaken. Under the “purpose” prong of the limited Economic Activity interpretation, the purpose of the regulation must be to affect a valuable transaction. The Act’s purpose was to indirectly control market prices for wheat, affecting wheat prices and minimizing the amplitude of price shifts resulting from varying supplies. In other words, the Act affects the price the seller of wheat receives in wheat market transactions. The buyer is receiving the valuable wheat in exchange for the indirectly regulated amount of cash. Thus, the Agricultural Adjustment Act is a regulation that has the purpose of affecting a valuable transaction. Under the limited Economic Activity

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<sup>173</sup> 317 U.S. 111 (1942), cited with approval in *Lopez*, 514 U.S. at 560.

<sup>174</sup> *Lopez*, 514 U.S. at 560.

<sup>175</sup> See 402 U.S. 146 (1971).

<sup>176</sup> See Nelson & Pushaw, *supra* note 3, at 82 (“*Wickard* enabled Congress to regulate whatever it pleased . . . .”); McGinnis, *supra* note 3, at 511 (stating the same).

<sup>177</sup> Two additional cases will be validated in the notes: *United States v. Darby*, 312 U.S. 100, 115 (1941), in which the Court first articulated the “plenary power” granted by the Commerce Clause; and *Russell v. United States*, 471 U.S. 858 (1985), a review that preceded *Lopez* of an arson statute and corresponding and use of explosives to cause fires.

<sup>178</sup> *Wickard*, 317 U.S. at 113-14.

<sup>179</sup> Agricultural Adjustment Act of 1938 § 331, 7 U.S.C. § 1331 (2003); see *Wickard*, 317 U.S. at 115.

interpretation, the Agricultural Adjustment Act is constitutional, consistent with the outcome in the *Wickard* Court.<sup>180</sup>

*Perez* marks the criminal law review undertaken for validation purposes. The question addressed in that case was whether the Consumer Credit Protection Act is constitutional under Commerce Clause authority.<sup>181</sup> The law prohibits extortionate credit transactions, which are transactions in which the debtor understands that failure to repay per the creditor's terms may result in "harm to the person, reputation, or property" of the debtor.<sup>182</sup> Congress produced findings that extortionate credit transactions, made through "loan sharks," are a significant means by which crime organizations are funded.<sup>183</sup> In other words, the purposes of the regulation are to protect consumers of credit and to diminish a stream of revenue for organized crime. Under the limited Economic Activity interpretation proposed by this paper, the first step is to determine whether the regulation directly affects a valuable transaction. Notwithstanding the Act's purpose of curtailing organized crime, the Consumer Credit Protection Act directly regulates extortionate credit transactions. First, the agreements being regulated are in fact transactions. Second, these transactions are valuable to both parties. The debtor, who is often unable to acquire credit from more reputable establishments, receives needed cash. The loan shark receives the future stream of extortionate cash flows, with low risk of default by the

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<sup>180</sup> Similarly in *Darby*, a Georgia lumber manufacturer violated the Fair Labor Standards Act, and the Court held that the law had a substantial effect on interstate commerce. See 312 U.S. at 111, 118-19. The law, although designed to protect workers, regulates the purchase of labor by employers. Fair Labor Standards Act of 1938 §§ 6-7, 29 U.S.C. §§ 201-202 (2003); see *Darby*, 312 U.S. at 109. The limited Economic Activity interpretation first requires answering whether the regulation directly affects a valuable transaction. The Act imposes minimum wage and maximum hour limits on labor. Employment is the trade of personal services in exchange for money. In the Act, Congress regulated the minimum price employers could pay for these services and the maximum number of hours that could be paid at the minimum price. *Darby*, 312 U.S. at 110 (quoting Fair Labor Standards Act of 1938 §§ 6-7, 29 U.S.C. §§ 206-07). This is a regulation directly affecting a valuable transaction, since the employees receive wages in exchange for the services received by the employers. The Act also prevents shipment in interstate commerce of goods created by labor not conforming to the prescribed minimum wage and maximum hour requirements. Prevention of shipments for particular reasons imposes regulation directly on a transaction. The transaction is valuable to both the employer, seeking pecuniary gains from the trade of the produced goods, and the purchaser, seeking some benefit from ownership of the goods. Thus, this part of the Act also satisfies the requirements imposed by the "direct affect" prong of the limited Economic Activity interpretation. The regulation directly affects a valuable transaction and is thus a regulation of an economic activity.

<sup>181</sup> See *Perez v. United States*, 402 U.S. 146, 146-47 (1971).

<sup>182</sup> See Title II of the Consumer Credit Protection Act, 18 U.S.C. §§ 891-896 (2003); *Perez*, 402 U.S. at 148.

<sup>183</sup> *Perez*, 402 U.S. at 149.

debtor due to the threat of violence. Thus, the Consumer Credit Protection Act is a regulation that directly affects a valuable transaction. The limited Economic Activity interpretation finds the Act constitutional, which is consistent with the *Perez* Court.<sup>184</sup>

#### IV. PREDICTING THE EFFECTS OF THE LIMITED ECONOMIC ACTIVITY INTERPRETATION

With an understanding of the mechanics of the limited Economic Activity interpretation as well as some confidence in the interpretation's appropriateness through Supreme Court validation, the current circuit court conflicts may now be analyzed. This section reviews the circuit court splits in light of the limited Economic Activity interpretation. Additionally, the interpretation's effects are assessed beyond the realm of the criminal law setting in environmental regulation.

##### A. ADDRESSING THE SPLIT CIRCUITS

###### *1. Possession of Child Pornography, 18 U.S.C. § 2252(a)(4)(B)*

Recall that the courts in *Rodia, Kallestad, Corp, McCoy, and Holston* all addressed the constitutionality of 18 U.S.C. § 2252(a)(4)(B), which prohibits manufacture and possession of child pornography made with

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<sup>184</sup> In 1985, the Court addressed whether a federal arson act was constitutional. See *Russell v. United States*, 471 U.S. 858, 858 (1985). The statute, part of Title XI of the Organized Crime Control Act of 1970, criminalizes the attempt to damage or destroy any building used in interstate commerce or "in any activity affecting interstate" commerce. Title XI of the Organized Crime Control Act of 1970, 18 U.S.C. § 844(i) (2003). Under the "direct affects" prong of the limited Economic Activity interpretation, the regulation must directly affect a valuable transaction. Here, the regulation directly prohibits arson. Moving to the "purpose" prong of the interpretation, the regulation must have the purpose of affecting a valuable transaction. Employing the second and third *Morrison* factors, a jurisdictional element and legislative intent, illuminates this inquiry. The statute is limited to the arson of structures affecting interstate commerce, which supports a decision that the statute has the purpose of affecting a valuable transaction. The legislative intent states that "[t]he section originated because of the need 'to curb the use, transportation, and possession of explosives.'" *Russell*, 471 U.S. at 862 (quoting *Explosives Control: Hearing on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., 1 (1970)). Stated another way, the purpose of the regulation is to indirectly restrict the interstate trade of explosives. The interstate trade of explosives involves valuable transactions. As such, the regulation has the purpose of affecting a valuable transaction. The Court went further to inquire as to whether the statute applies to attempted arson of a two-unit apartment used as a rental property. See *id.* at 859. By statutory interpretation, "[t]he rental of real estate is unquestionably" commercial activity, meaning that the statute applies to the defendant. *Id.* at 862.

materials that have traveled through interstate commerce.<sup>185</sup> The First, Second, Third, Fifth, and Seventh Circuits have all found the statute constitutional and the Sixth and Ninth Circuits have found the statute unconstitutional as applied to particular defendants.

The first step under the limited Economic Activity interpretation is to address whether the statute directly affects a valuable transaction.<sup>186</sup> Section 2252(a)(4)(B) only regulates *possession*, which unlike transactions, only involves one person. Admittedly, trades occur between manufacturers of the materials needed to make child pornography, but the law criminalizes possession of child pornography, not the trade of materials that may possibly be used by someone producing child pornography. As such, the regulation does not involve a transaction.<sup>187</sup>

Focus turns to the second step, which calls for a review of whether the purpose of the regulation is to affect a valuable transaction. Use of a jurisdictional element and legislative history aid in this inquiry. The statute does employ a jurisdictional element,<sup>188</sup> but the element does not modify possession of child pornography. Rather, the jurisdictional element modifies the shipment of materials prior to their use in making child pornography. The element used here does not support a finding that the purpose of the statute is to regulate a valuable transaction. More significantly, the legislative history states that the purpose of the statute is to enhance federal efforts to "combat child pornography."<sup>189</sup> Effects of child pornography, like effects of gender abuse seen in *Morrison*, have an effect on the national economy. In terms of the limited Economic Activity

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<sup>185</sup> The constitutionality of 18 U.S.C. § 2252(a)(4)(B) has also been addressed by the First Circuit in *United States v. Robinson*, 137 F.3d 652 (1st Cir. 1998) and the Seventh Circuit in *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000).

<sup>186</sup> The statute prohibits the possession of child pornography that was produced using material that had traveled through interstate commerce. 18 U.S.C. § 2252(a)(4)(B) (2003). Note that § 2252(a)(4)(B) also criminalizes possession of child pornography when the finished product has been shipped through interstate commerce. That part of the statute has not been attacked on Commerce Clause grounds and is constitutional under the "purpose" category of the limited Economic Activity interpretation.

<sup>187</sup> The value element (*i.e.*, "valuable transaction") is satisfied by possession, since, economically speaking, people only possess things of value. However, "value" in the limited Economic Activity interpretation modifies "transaction" and is alone insufficient.

<sup>188</sup> The statute criminalizes possession of child pornography "produced using materials which have been mailed or so shipped or transported, by any means including by computer." 18 U.S.C. § 2252(a)(4)(B).

<sup>189</sup> See *supra* note 68 and accompanying text; S. REP. NO. 95-438, at 8 (1977), *reprinted* in 1978 U.S.C.A.N. 40, 47 (advocating legislative changes and enforcement procedures in order to enhance combative efforts). Congress was concerned that "because of the vast potential profits in child pornography, these sordid enterprises are growing at a very rapid rate." *Id.* at 7.

interpretation, the Congressional findings show that the purpose of the statute is protection of children from being abused and exploited.<sup>190</sup> Although certainly problematic, the exploitation of children for the production of pornography is not a valuable transaction affected by the statute. As such, under the limited Economic Activity interpretation proposed by this paper, criminalizing mere possession of child pornography produced with material that has traveled through interstate commerce per 18 U.S.C. § 2252(a)(4)(B) is not an economic activity and is consequently unconstitutional.<sup>191</sup>

## 2. *The Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248*

The next statute to address is the FACE Act, which criminalizes attempts to prevent access to abortion clinic entrances.<sup>192</sup> Recall that the Fifth Circuit's 1997 *Bird I* decision found the Act constitutional, relying on the approach to Commerce Clause attacks outlined in *Lopez*.<sup>193</sup> In 2003, the Southern District of Texas rejected the holding in *Bird I* and found the FACE Act unconstitutional,<sup>194</sup> even though that court is bound by Fifth Circuit precedent and even though the Fifth Circuit had since applied the *Morrison* Economic Activity Test in *Kallestad*.<sup>195</sup>

The first category of the limited Economic Activity interpretation proposed here can be easily applied to § 248. The statute criminalizes attempts to prevent access to abortion clinic entrances. Obstruction of a building's entrance is not a valuable transaction.<sup>196</sup> The party attempting to

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<sup>190</sup> See *id.* at 8.

<sup>191</sup> The outcome presented here is in direct conflict with the First, Second, Third, Fifth, and Seventh Circuits. Furthermore, the outcome here finds the portion of § 2252(a)(4)(B) criminalizing possession with interstate travel of used materials *facially unconstitutional* and not merely unconstitutional as applied to the particular defendants. This is a broader outcome than the as-applied unconstitutional holdings of the Sixth Circuit in *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001), and the Ninth Circuit in *United States v. McCoy*, 323 F.3d 1114, 1133 (9th Cir. 2003).

<sup>192</sup> See Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (1994) [hereinafter FACE]; *supra* notes 91-92.

<sup>193</sup> See *United States v. Bird (Bird I)*, No. 95-20792, 1997 U.S. App. LEXIS 33988 (5th Cir. Sept. 24, 1997).

<sup>194</sup> See *United States v. Bird (Bird II)*, 279 F. Supp. 2d 827, 836 (S.D. Tex. 2003) (holding § 248 of FACE unconstitutional); see also *supra* note 104 and accompanying text.

<sup>195</sup> The District Court for the Southern District of Texas applied the *Morrison* factors and distinguished the Fifth Circuit's *Kallestad* decision. See *id.* at 836 ("It is apparent, from a reading of [§ 248], that it criminalizes noneconomic, intrastate activities.").

<sup>196</sup> Like with § 2252(a)(4)(B) above, an argument can be made that the obstruction of abortion clinic entrances is valuable to the actor. The actor wants to prevent abortions through his or her actions, which presumably enhances his or her happiness. However, like

enter the building does not contract with the person obstructing the entrance for the privilege of being obstructed. Without an exchange or contract, the "direct affect" category fails, and a review of the statute's purpose is required.

To be constitutional, the purpose of the regulation must be to affect a valuable transaction, and in addressing purpose, the existence of a jurisdictional element and legislative findings are probative but not dispositive.<sup>197</sup> Section 248 of the FACE Act includes no jurisdictional element. Moreover, "[t]he Freedom of Access to Clinic Entrances Act is designed to protect health care providers and patients from violent attacks, blockades, threats of force, and related conduct intended to interfere with the exercise of the constitutional right to terminate pregnancy."<sup>198</sup> In other words, the stated purpose of the Act is not the preservation of abortion transactions but rather the protection of the constitutional right of women to have access to safe abortions.

Section 248 is an example of when review of the second and third *Morrison* factors does not end the inquiry.<sup>199</sup> Unlike the VAWA, in which Congress could not point to any specific type of valuable transaction negatively affected by gender abuse, and unlike 18 U.S.C. § 2252(a)(4)(B), in which child safety was regulated through the criminalization of homemade child pornography possession, not child pornography transactions, the purpose of § 248 is protection of valuable abortion transactions. Admittedly, concerns for the safety of those entering and exiting abortion clinics parallels those concerns for children abused by the child pornography industry. But the purpose of § 248 is to protect the valuable contracts between patients and abortion clinics being transacted by inhibiting activists from barricading clinic entrances, which must be accessible for these transactions to occur. In disagreement with the Southern District of Texas's *Bird II* holding, analyzing the FACE Act through the lens of this paper's limited Economic Activity interpretation results in holding the Act constitutional.

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with § 2252(a)(4)(B), no argument can be made that the activity is an exchange, transaction, or contract.

<sup>197</sup> See *supra* Section III.A.

<sup>198</sup> S. REP. NO. 103-117 at 11 (1993) ("The express purpose of the violent and threatening activity . . . is to deny women access to safe and legal abortion services. Anti-abortion activists have made it plain that this conduct is part of a deliberate campaign to eliminate access by closing clinics and intimidating doctors.").

<sup>199</sup> See generally McGinnis, *supra* note 3, at 514 (arguing that Congress does not make findings in an unbiased way, but rather "tend[s] to find whatever predicates are necessary to advance its members' prospects of reelection").

### 3. Possession of Home-Grown Machineguns, 18 U.S.C. § 922(o)

The final statute to review is 18 U.S.C. § 922(o), which criminalizes all unsanctioned transfer and possession of machineguns.<sup>200</sup> The Ninth Circuit in *Stewart* held that the statute is unconstitutional as applied to defendants in mere possession of homemade machineguns.<sup>201</sup> As with both 18 U.S.C. § 2252(a)(4)(B) and the FACE Act, the “possession” category of § 922(o) does not directly affect an exchange, transaction, or contract.<sup>202</sup> Although machinegun ownership may have value to gun enthusiasts, various assassins, and citizens particularly concerned about personal safety, possession does not equal exchange. The regulation is thus only constitutional if the purpose is to affect a valuable transaction. However, according to the Ninth Circuit, “there is no evidence that § 922(o) was enacted to regulate commercial aspects of the machinegun business.”<sup>203</sup> Moreover, the express purpose of the law is to provide support to local, state, and federal law enforcement alike in fighting crime and violence.<sup>204</sup> Finally, § 922(o) employs no jurisdictional element whatsoever.

Section 922(o) is distinguishable from the FACE Act, which is constitutional under the limited Economic Activity interpretation despite neither a jurisdictional hook nor adequate legislative intent. The FACE Act prevents activists from blocking anyone from entering abortion clinics, including patients, doctors, nurses, janitors, mail carriers, etc. But activists

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<sup>200</sup> 18 U.S.C. § 922(o) (1986).

<sup>201</sup> See *United States v. Stewart*, 348 F.3d 1132, 1140 (2003). Before analyzing § 922(o) under the *Morrison* structure, the court overturned Ninth Circuit precedent created in *United States v. Rambo*, 74 F.3d 948 (1996). In that case, the court held § 922(o) constitutional under the *Lopez* first category: a channel of commerce. The court reasoned that possession of machineguns must be preceded by trade of machineguns through interstate commerce. *Stewart* “reveals the limits of *Rambo*’s logic,” since *Stewart* fabricated the machineguns himself. See *Stewart*, 348 F.3d at 1135.

<sup>202</sup> The “transfer” category of § 922(o) is analyzed differently. For this category, the regulation may have a direct effect on a valuable transaction. Presumably, a transfer of a machinegun from a transferor is accompanied by some remuneration paid by the machinegun recipient to the transferor. Further, the machinegun has value to the recipient and the cash exchanged for the machinegun has value to the transferor. As such, the transfer of machinegun regulation in § 922(o) is a regulation of a valuable transaction consistent with the limited Economic Activity interpretation proposed here.

<sup>203</sup> See *Stewart*, 348 F.3d at 1137. Additionally, “nothing in the legislative history of any of the earlier firearms statutes speaks to the relationship between mere possession of firearms and interstate commerce.” See *id.* at 1139 (citing S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2197 (addressing the need to regulate firearms traffic into the U.S.); H.R. REP. NO. 90-1577 (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4411 (finding a need to control interstate and foreign firearms commerce in order to assist the states)).

<sup>204</sup> Gun Control Act of 1968 § 101, Pub. L. No. 90-618, 82 Stat. 1213 (1968).



who block entrances are only concerned with preventing the transaction of abortion services. Section 922(o) may have been designed to regulate possession for the purpose of affecting machinegun transactions. However, where abortion activists have a unitary purpose in barricading abortion clinic entrances, possession of a machinegun is not necessarily for the purpose of making a sale.<sup>205</sup> Machinegun possession—particularly coupled with possession of machinegun bullets—provides the owner with much more than the ability to participate in a sale, whereas barricading an abortion clinic entrance serves no purpose other than preventing parties from entering valuable abortion transactions. Under the limited Economic Activity interpretation proposed here, § 922(o) is unconstitutional.<sup>206</sup>

#### B. CIVIL LAW UNDER THE LIMITED ECONOMIC ACTIVITY INTERPRETATION

This paper has focused on the effects of *Lopez* and *Morrison* on criminal law created per Congress's Commerce Clause authority. However, the cases and the limited Economic Activity interpretation proposed here have implications well beyond the bounds of criminal law. The loudest critics of a limited interpretation of *Morrison*'s Attenuation Factor may be environmentalists concerned that environmental regulation, also created per Congressional Commerce Clause power, will be diminished or eliminated. Their concerns are understandable, considering that much, if not all, existing environmental regulation enhances the public welfare. Furthermore, the States are each at a strategic disadvantage compared to the federal government when regulating the consumption of environmental resources, since each state would prefer less environmental regulation to more, thereby causing an environmental "race to the bottom."<sup>207</sup>

Environmentalists should not construe the limited Economic Activity interpretation as signaling the demise of federal environmental regulation and the consequential approach of an environmental Armageddon. Since the New Deal, the Supreme Court has recognized the need for an expanded interpretation of "commerce" to operate in the modern industrial world.<sup>208</sup> Environmental regulation has a place in this expanded view, even under the restrictive Attenuation Factor interpretation presented here. The restrictive

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<sup>205</sup> See *Stewart*, 348 F.3d at 1137.

<sup>206</sup> The Ninth Circuit only found § 922(o) unconstitutional as applied to *Stewart*. See *id.* at 1140.

<sup>207</sup> Cf. *Regan*, *supra* note 20, at 609 (arguing that states experience some Prisoners' Dilemma effects when choosing an optimal amount of environmental regulation).

<sup>208</sup> *United States v. Lopez*, 514 U.S. 549, 556-57 (1995) (citing *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

interpretation of the Attenuation Factor only operates on the Substantial Effects Category of *Lopez* and not on either the Channels of Commerce Category or the Instrumentalities of Commerce Category. Under this construct, all regulation of pollution in the air and waterways will not be affected by the approach of this paper, since all pollution regulation is regulation of the *channels of commerce*. Even pollution of underground water tables is protected, since this water eventually reaches surface waterways. Environmentalists should take comfort in the fact that, even if the Court one day adopts Justice Thomas's Originalist's interpretation of "commerce" and the Commerce Clause, regulation of channels, upheld since the Marshall Court, will still be preserved.<sup>209</sup>

The regulation of human encroachment on and destruction of wildlife, however, is different. The Endangered Species Act of 1973<sup>210</sup> regulates neither channels of commerce, since plants and animals are not comparable to lakes, streams, or air; nor instrumentalities, since wildlife is not akin to trucks, boats, or airplanes. As such, the Endangered Species Act must have a substantial effect on interstate commerce, per the limited Economic Activity interpretation proposed here, in order to be constitutional under the Commerce Clause. Since regulating the protection of animals is not the direct regulation of valuable transactions, the Act must have the purpose of effecting valuable transactions. But the Act employs no jurisdictional element. Further, the Act's purpose is to preserve ecosystems inhabited by endangered species and to provide programs for the conservation of endangered and threatened species.<sup>211</sup> The Act preserves the "esthetic, ecological, educational, historical, recreational, and scientific value" of wildlife for the nation's benefit.<sup>212</sup> And unlike the FACE Act, the Endangered Species Act does not have an unstated purpose of directly affecting a valuable transaction. As such, the Act does not have the purpose of regulating a valuable transaction and is accordingly unconstitutional under the limited Economic Activity interpretation. This shows the unfortunate side-effect of curbing the once-plenary power Congress wielded; some popular, socially beneficial laws are simply unconstitutional when the Commerce Clause is not interpreted to make Congress omnipotent. Bounds must be drawn on Congressional Commerce Clause power in order for federalism to survive, and the Endangered Species Act is beyond the bound drawn by the limited Economic Activity interpretation.

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<sup>209</sup> See *United States v. Coombs*, 37 U.S. 72 (1838); *Gibbons v. Ogden*, 22 U.S. 1 (1834).

<sup>210</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

<sup>211</sup> 16 U.S.C. § 1531(b).

<sup>212</sup> 16 U.S.C. § 1531(a)(3).

Environmentalists, however, should neither concede the fight for wildlife nor turn their ire toward the limited Economic Activity interpretation. Instead, focus should turn to the Constitution's amendment process.<sup>213</sup> Regulation of the environment, as Professor Donald Regan notes, cannot be successfully implemented by the competing states.<sup>214</sup> Furthermore, the environment is a public good that cannot go unregulated, due to Tragedy of the Commons problems.<sup>215</sup> In other words, regulation of endangered species, and more generally, regulation of the environment as a whole, belongs with the federal government. Since under the limited Economic Activity interpretation, the Constitution currently does not provide Congress with certain environmental regulatory powers, such as those needed for the Endangered Species Act to be constitutional, a Constitutional amendment is the appropriate resolution.

## V. CONCLUSION

Whether the circuit courts currently refuse to strictly abide by *Morrison* due to confusion, ideological disagreement, or belief that *Lopez* and *Morrison* do not amount to new Commerce Clause restrictions, the refusal has led to a variety of inconsistencies in Commerce Clause constitutionality attacks. Unfortunately, this is an area in which uniformity is most desired, particularly because Congress will not abide by the Supreme Court's Commerce Clause limitations when making federal criminal law knowing that the laws will not be found unconstitutional in the lower courts. The constitutionality of 18 U.S.C. § 2252(a)(4)(B), the child pornography possession statute; the FACE Act; and 18 U.S.C. § 922(o), the machinegun possession statute, all are ripe for further adjudication. Although review of any one of these by the Supreme Court will offer the opportunity for further refinement of the *Morrison* Economic Activity Test, uniformity and consistency may also be achieved if lower courts adhere to the guiding principles relied upon in this paper.

This paper has shown that a workable, clear standard exists for deciding whether a regulated activity is "economic." The paper has also shown that a clear standard does not need to conflict with a desired "case-by-case inquiry." With further review, the once-plenary "Hey, you-can-do-whatever-you-feel-like Clause"<sup>216</sup> will again have the form of an

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<sup>213</sup> U.S. CONST. art. V.

<sup>214</sup> See Regan, *supra* note 20, at 609.

<sup>215</sup> See Garrett Hardin, *The Tragedy of the Commons*, SCI., Vol. 162, No. 3859, Dec. 13, 1968, at 1243.

<sup>216</sup> See Kozinski, *supra* note 43, at 5.

enumerated power, thereby reserving a wide range of legislative authority, including the vast criminal law domain, to the States.

